SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 9

CULLEN FUEL COMPANY, INC., OWNER OF DECK SCOW "CULLEN No. 32," PETITIONER,

vs.

W. E. HEDGER, INC., BAILEE OF CARGO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Petition of the CULLEN FUEL CO., INC., as owner of the Deck Scow "Cullen No. 32," for Exoneration or Limitation of Liability

STATEMENT

Mar. 20, 1928.—Filed Petition.

Mar. 21, 1928.—Filed Order Restraining Suits of Long Island Company, et al.—Thacher, J.

Apr. 19, 1928.—Filed Answer of Long Island Railroad Company.

July 13, 1928.—Filed Answer of W. E. Hedger & Company, Inc.

Nov. 13, 1930.—Before Woolsey, J., trial began, tried with A91-392, 97-186 and 93-381. Adjourned to Nov. 14, 1930.

Nov. 14, 1930.—Before Woolsey, J., trial resumed. Adjourned to Nov. 17, 1930.

Nov. 17, 1930.—Before Woolsey, J., trial resumed. Adjourned to Nov. 18, 1930.

Nov. 18, 1930.—Before Woolsey, J., trial resumed. Cases argued and submitted.

Nov. 24, 1930.—Filed Opinion #6158—Woolsey, J. (See Opinion.)

Jan. 5, 1931.—Filed Order, that the opinion stand as to Findings of Fact and Conclusions of Law, etc.—Woolsey, J.

Jan. 21, 1931.—Filed Interlocutory Decree with Reference to Horace M. Gray—Woolsey, J.

Feb. 11, 1931.—Filed Notice of Appeal and Order—Woolsey, J.

Feb. 11, 1931.—Filed Assignments of Error.

[fol. 2] IN UNITED STATES DISTRICT COURT

PETITION OF CULLEN FUEL CO., INC.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Petition of Cullen Fuel Co., Inc., as Owner of Deckscow "Cullen No. 32," her tackle, apparel, etc., for exoneration or limitation of liability in a cause of damage, civil and maritime, alleges as follows:

First. That at all the times hereinafter mentioned the petitioner, Cullen Fuel Co., Inc., was and still is a corporation organized and existing under and by virtue of the Laws of the State of New York, and at all of the times hereinafter mentioned was the owner of the deckscow "Cullen No. 32" and maintains its principal office and place of business in the Borough of Manhattan, City of New York.

Second. That the said deckscow "Cullen No. 32" is now within the Harbor of New York, within this District and the jurisdiction of this Honorable Court.

Third. That up to the time of the disaster hereinafter described the deckscow "Cullen No. 32" was tight, staunch, strong and in all respects seaworthy.

Fourth. That on August 11, 1925, the said deckscow "Cullen No. 32" was chartered through its agent, Cullen Transportation Co., Inc., to W. E. Hedger Co., Inc., a corporation organized and existing under and by virtue of the Laws of the State of New Jersey under an oral charter amounting to a demise, pursuant to which the said W. E. [fol. 3] Hedger Co., Inc., agreed to pay charter hire at a certain rate per day for an indefinite period of time and to return the said deckscow to said petitioner or its agent, Cullen Transportation Co., Inc., in the same good condition as when received, ordinary wear and tear excepted.

Fifth. That delivery of the said deckscow to the said W. E. Hedger Co., Inc., was made on August 11, 1925, pursuant to the terms of the aforesaid charter and the said deckscow was in the complete care, custody and control of the said W. E. Hedger Co., Inc., at the time of the disaster

hereinafter described and was thereafter returned to said petitioner in a damaged condition, which was not the result of ordinary wear and tear.

Sixth. Upon information and belief, that after the delivery of the said deckscow to W. E. Hedger Co., Inc., on August 11, 1925, as aforesaid, and while the said deckscow was in the complete care, custody and control of the said W. E. Hedger Co., Inc., and on or about August 13, 1925, she was taken alongside the S/S "Berk" which lay at the pier at the foot of Roosevelt Street, East River, and was placed outside of a derrick lighter which lay alongside the S/S "Berk." While lying at this place the "Cullen No. 32" was loaded with a cargo of ore by the said W. E. Hedger Co., Inc., its servants and/or agents and/or persons employed by it. That after the said scow was so loaded and while still in the custody and control of the W. E. Hedger Co., Inc., she was caused to dump part of her cargo, to turn over and to come into contact with the Long Island Railroad "Float No. 10," and to strike the end of Pier 22.

[fol. 4] Seventh. That the aforesaid disaster and any and all losses, damages and injuries resulting therefrom were occasioned without the privity or knowledge of the petitioner herein and were not occasioned or contributed to by any fault or negligence on the part of this petitioner, nor through the unseaworthiness of the deckscow "Cullen No. 32," nor on the part of any person for whom petitioner was or is responsible, but were sustained through the fault, negligence and lack of care of the W. E. Hedger Co., Inc., in whose possession, custody and control the said deckscow was at the time of the occurrence hereinabove described, in the following among other particulars:

1. In that the said W. E. Hedger Co., Inc., its servants, agents and/or agents failed to load said deckscow in a careful manner;

2. In failing to have the cargo on said deckscow properly stowed and trimmed;

3. In that they stowed and trimmed the cargo of said deckscow improperly;

4. In that they overloaded the said deckscow;

5. In that they failed to place the said deckscow in a proper and safe position after it was loaded;

or the said damage was caused by some other person or persons for whom this petitioner is in no way responsible.

Eighth. Nevertheless, an action at law has been commenced in the Supreme Court, New York County, by the [fol. 5] Long Island Railroad Co. against your petitioner, as owner of said deckscow, claiming damages in the sum of $3,000.00. It is alleged in the complaint in said suit that the plaintiff therein is the owner of Pier 22, East River, New York; that on August 13, 1925, your petitioner's deckscow "Cullen No. 32" because of her unseaworthy condition and the negligence of her owner in not having the scow properly manned and her cargo properly stowed and trimmed, listed and capsized, dumping her cargo and that as she dumped her cargo she jumped across the slip and struck Pier 22 with great force, causing extensive damages to the pier, all without fault or negligence on the part of said plaintiff. The attorneys for the plaintiff in said suit are Messrs. Burlingham, Veeder, Masten & Fearey, No. 27 William Street, Borough of Manhattan, City of New York.

Ninth. That an action in admiralty has been commenced in the United States District Court for the Southern District of New York by the Long Island Railroad Co. against your petitioner, as owner of the deckscow "Cullen No. 32", claiming damages in the sum of $5,000.00. It is alleged in the libel in said suit that the libellant therein is the owner of carfloat "Long Island Railroad No. 10"; that on August 13, 1925, the said carfloat was lying moored on the up river side of Pier 22, East River, and that on said day the deckscow "Cullen No. 32" listed and capsized, dumping her cargo, and that as she dumped her cargo the said scow jumped across the slip and struck Pier 22 and the carfloat "Long Island Railroad No. 10" with great force, causing extensive damages to the pier and carfloat and that said [fol. 6] damages were due to the unseaworthiness of the deckscow "Cullen No. 32" and the fault and negligence of your petitioner in that it permitted the deckscow "Cullen No. 32" to be loaded with cargo while in an unseaworthy condition; in failing to have a competent person on the said scow; in failing to have the said scow seasonably pumped

out and properly stowed and trimmed. The attorneys for the libellant in said suit are Messrs. Burlingham, Veeder, Masten & Fearey, No. 27 William Street, Borough of Manhattan, City of New York.

Tenth. That an action in admiralty has been commenced in the United States District Court for the Southern District of New York by W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore laden on board the deck scow "Cullen No. 32" against said deckscow claiming damages in the sum of $5,000.00. It is alleged in the libel in said suit that on August 13, 1925, the deckscow "Cullen No. 32" having on board the libellant's cargo of barytes ore which had been loaded on said deckscow by another respondent, Port Fueling Corporation, due to her unseaworthy condition and/or to the fact that she was not properly loaded, listed and capsized, dumping all her cargo into the river, and that said dumping and capsizing were due to fault on the part of the deckscow "Cullen No. 32" and those in charge of her, your petitioner, and the Fort Fueling Corporation. The attorneys for the libellant in said suit are Messrs. Single & Single, No. 15 William Street, Borough of Manhattan, City of New York.

Eleventh. That the value of the said deckscow "Cullen No. 32" after the disaster before mentioned was $250.00 [fol. 7] and that there was no pending freight on the said deckscow. That the interest of your petitioner in the said deckscow "Cullen No. 32" and her freight pending at the time of the disaster was $250.00.

Twelfth. That your petitioner herein claims exoneration from liability for any and all losses, damages and injuries resulting from the aforesaid accident and in the alternative claims the benefit of limitation of liability provided in Sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the various Statutes amendatory thereof and supplemental thereto, and your petitioner is ready and willing to give a stipulation with sureties for payment into court of the amount of the value of its interest in the said deckscow "Cullen No. 32" and her pending freight in their condition immediately after the accident aforesaid, whenever same shall be ordered, as provided by the aforesaid statutes, and by the general rules in admiralty and by the rules and practice of this court.

Thirteen. Except as above set forth that there are no demands, unsatisfied liens, or claims of liens or any suits pending thereon (except such as have been properly secured by bond and stipulation) against the deckscow "Cullen No. 32" or its appurtenances, as far as your petitioner knows.

Fourteenth. All and singular the premises are true.

Wherefore your petitioner prays that this court will cause due appraisement to be made of the amount of the [fol. 8] value of its interest in the deckscow "Cullen No. 32", and her pending freight, as of the time of the accident aforesaid, in pursuance of the Statutes of the United States aforesaid, and will make an order for the giving of a stipulation with sureties for the payment thereof into court, whenever the same shall be ordered by the court, and will cause a monition to be issued to all persons claiming damages for any and all loss, damage or injury caused by or resulting from the accident aforesaid, citing them to appear before a Commissioner to be named by this court and to make due proof of their respective claims, at or before a certain time fixed by the writ, and also to appear and answer the allegations of this petition, according to the law and practice of this court; and that the court on the filing of such stipulation as may be deemed to be proper, or on the payment into court of the appraised value of the petitioner's interest in the said deckscow "Cullen No. 32" and her pending freight will issue its injunction restraining the prosecution of the aforesaid suits and actions set forth against the petitioner, and the commencement and prosecution thereafter of any suit or action or legal proceedings of any nature or description whatever, against the petitioner herein, except in the present proceeding, in respect to any claim or claims arising out of the aforesaid accident.

Your petitioner further prays that the court will adjudge that the petitioner is not liable to any interest in loss, damage or injury arising from the aforesaid accident, or, in the alternative, that if the petitioner be held liable therefor, its liability may be limited to the amount of the value of its interest in the said deckscow "Cullen No. 32" and her pend- [fols. 9 & 10] ing freight, and that the money paid or ordered to be paid as aforesaid be divided pro rata among such claimants as have duly proved their claims before a Commissioner to be appointed herein, saving to all parties

any priority to which they may be entitled, and that your petitioner have such other and further relief as to the court may seem just.

Macklin, Brown, Lenahan & Speer, Proctors for Petitioner, Office and P. O. Address: 44 Beaver Street, Borough of Manhattan, City of New York.

Duly sworn to by R. H. Samhaus. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—March 20, 1928

An order having been entered herein on the 20th day of March, 1928, providing that the further prosecution or institution and prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever, against the Deck Scow "Cullen No. 32," her engines, boilers, etc., or against the petitioner herein or against any other person or persons interested in the said vesel in respect of any claim arising out of or connected with the matters set forth in the petition herein should be restrained and an ad interim stipulation for value in the sum of $250.00 with interest from August 11th, 1925, with sufficient [fol. 12] security undertaking to pay into court within ten days after the entry of an order confirming the report of a commissioner to be appointed to appraise the amount of the value of the interest of the petitioner in the said Deck Scow "Cullen No. 32" and her pending freight, if any, as of August 11th, 1925, the amount or value of such interest as thus ascertained or to file in this proceeding a bond or stipulation for value in the usual manner with surety in the said amount and that pending the payment into court of the amount or value of the interest of petitioner in said Deck Scow "Cullen No. 32" and her pending freight so ascertained, if any, or the giving of a stipulation for value therefor, the said bond shall stand as security for all claims in said limitation proceedings having been duly filed with the Clerk of this Court on the 20th day of March, 1928.

Now, on motion of Macklin, Brown, Lenahan & Speer, proctors for the petitioner, it is

Ordered that further prosecution of the suit by Long Island Railroad Company v. Cullen Fuel Co., Inc., in the Supreme Court of the State of New York for the County of New York.

Long Island Railroad Company, as owner of the "Long Island Railroad No. 10" v. Cullen Fuel Co., Inc., in the United States District Court for the Southern District of New York.

W. E. Hedger Co., Inc., as bailee against Scow "Cullen No. 32" and Cullen Fuel Co., Inc., and Fort Fueling Corporation, U. S. Dist. Court, Southern District, and the institution and prosecution of any and all suits, actions or legal proceedings of any nature or description whatsoever ex-
[fols. 13-17] cepting the present proceeding against the petitioner or any person or persons interested in the said Deck Scow "Cullen No. 32" or against the said Deck Scow "Cullen No. 32," her tackle, apparel, etc., in respect of any claim arising out of or consequent to or connected with the alleged happening which occurred on or about August 11th, 1925, be and the same hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that the service of this order as a restraining order be made within this district by delivering a copy thereof to the person or persons to be restrained or to their respective proctors or attorneys or any other district by the United States Marshal for such district delivering a copy of this order to the person or persons to be restrained or to their respective attorneys or proctors in case action, suit or other legal proceedings have been taken.

T. D. Thatcher, U. S. D. J.

[fol. 18] IN UNITED STATES DISTRICT COURT

ANSWER OF W. E. HEDGER CO., INC.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore, lately laden on board the deck scow "Cullen No. 32" to the petition of the Cullen Fuel Company, Inc., as owner of said deck scow "No. 32," her tackle, apparel, etc.,

for exoneration or limitation of liability, in a cause of damage, civil and maritime, alleges on information and belief, and respectfully shows to this Honorable Court as follows:

[fol. 19] First. As to the allegations in the "First" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Second. As to the allegations in the "Second" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Third. It denies each and every allegation in the "Third" article of said petition.

Fourth. It denies each and every allegation in the "Fourth," "Fifth" and "Sixth" articles of said libel in so far as the same is inconsistent with the allegation contained in the libel of this respondent, W. E. Hedger Co., Inc., against the scow "Cullen No. 32," heretofore filed in this court and except in so far as herein admitted or modified in the "Thirteenth" and "Fourteenth" articles of this answer.

Fifth. It denies each and every allegation in the "Seventh" article of said petition.

Sixth. It admits that an action at law has been commenced in the Supreme Court, New York County, by Long Island Railroad Company against the petitioner, claiming damages in the sum of three thousand ($3,000) dollars, and denies each and every allegation in the "Eighth" article of said libel, excepting in so far as the same is confirmed by the complaint in said action, copy of which is in the hands of this petitioner, and is hereby referred to for greater certainty.

[fol. 20] Seventh. It admits that an action has been commenced in the United States District Court for the Southern District of New York in admiralty by the Long Island Railroad Company against the petitioner as owner of the deck scow "Cullen No. 32" claiming damage in the sum of Five thousand ($5,000) dollars, and denies each and every other allegation in the "Ninth" article of said petition, excepting in so far as the same is confirmed by the papers and documents in said action now on file in the office of the clerk of this court.

Eighth. It admits that an action has been begun in admiralty in the United States District Court for the Southern District of New York, by this respondent, W. E. Hedger Co., Inc., as bailee of a cargo of barytes ore laden on board the deck scow "Cullen No. 32" against the deck scow "Cullen No. 32," claiming damages in the sum of Five thousand ($5,000) Dollars, and it denies each and every other allegation in the "Tenth" article of said petition, excepting in so far as the same is confirmed by the papers and documents in said action now on file in the office of the clerk of this court.

Ninth. As to the allegations in the "Eleventh" article of said libel, after the disaster in said petition mentioned, the value of the said deck scow "Cullen No. 32" and the interest of the petitioner herein and her freight pending was only Two hundred and fifty ($250) Dollars, it denies that it has any knowledge or information thereof sufficient to form a belief.

Tenth. As to the allegations in the "Twelfth" article of said petition it denies that it has any knowledge or infor-
[fol. 21] mation thereof sufficient to form a belief.

Eleventh. As to the allegations in the "Thirteenth" article of said petition, it denies that it has any knowledge or information thereof sufficient to form a belief.

Twelfth. It denies each and every allegation in the "Fourteenth" article of said petition.

Further answering said petition, this respondent alleges that the true facts and circumstancess attempted to be set forth in said petition are as follows:

Thirteenth. At the time of the occurrences hereinabove in said petition mentioned, the said deck scow "Cullen No. 32" was owned and managed and operated by the petitioner Cullen Transportation Co., Inc. On or about the 13th day of August, 1925, the said deck scow "Cullen No. 2" having on board the libellant's cargo of barytes ore which had been loaded on the said deck scow by the Port Fueling Corporation from the steamship "Berk," was lying alongside the said steamship "Berk" at the foot of Roosevelt Street, East River. At about one P. M. when approximately four hundred (400) tons of ore had been loaded on

board the said deck scow "Cullen No. 32" the said scow "Cullen No. 32," due to her unseaworthy condition, and the fact that she was not properly loaded, listed and capsized, dumping all the cargo that was on her into the river.

Fourteenth. The aforesaid capsizing and resulting loss [fol. 22] of libellant's cargo was not caused through any fault, neglect or want of care on the part of the libellant or those for whom libellant is responsible, but was caused through the fault, neglect and want of care on the part of the Scow "Cullen No. 32," and those in charge of her operation and control, and the Cullen Transportation Co., Inc., and the Port Fueling Corporation, its agents, servants and employees in the following, among other particulars:

As to the Scow "Cullen No. 32" and the respondent Cullen Transportation Co., Inc.:

1. In that the said scow "Cullen No. 32" was old and unseaworthy;

2. In that those in charge of the said scow were careless, incompetent and inattentive to their duties;

3. In that the master of the said scow failed to keep her properly pumped out;

4. In that the said scow was not in charge of a competent person;

and in other respects which will be pointed out at the trial of this action.

As to the respondent, Port Fueling Corporation:

1. In that its agents, servants and employees in charge of the loading of the cargo on board the scow "Cullen No. 32" were careless, incompetent and inattentive to their duties;

2. In failing to properly load and trim the cargo on the scow "Cullen No. 32,"

[fol. 23] and in other respects which will be pointed out at the trial of this action.

Fifteenth. That by reason of the foregoing the libellant has been damaged in the total loss of its cargo, survey fees, etc., in approximately the sum of Five thousand Dollars ($5,000), no part of which has been paid.

Sixteenth. All and singular the premises are true.

Wherefore this respondent prays that the petition herein be dismissed with costs.

Single & Single, Proctors for Respondent, W. E. Hedger Co., Inc., Office & P. O. address: 15 William Street, Borough of Manhattan, New York City.

[fol. 24] *Duly sworn to by S. W. Pierce. Jurat omitted in printing.*

[fol. 25] IN UNITED STATES DISTRICT COURT

INTERROGATORIES PROPOUNDED BY RESPONDENT TO BE ANSWERED BY LIBELLANT UNDER OATH

First interrogatory: What is the age of the Scow "Cullen No. 32"?

Second interrogatory: If the scow "Cullen No. 32" was not built for you, state (a) where she was built; (b) when you purchased the said scow "Cullen No. 32"; (c) from whom the scow "Cullen No. 32" was purchased; (d) her age at the time you purchased her?

Third interrogatory: When were repairs last made to the scow "Cullen No. 32"?

Fourth interrogatory: (a) Annex an itemized copy of the bill for repairs made to the said scow; (b) if the repairs above referred to were made in accordance with the survey, annex a copy of the survey.

Fifth interrogatory: (a) When was the scow "Cullen No. 32" last in dry dock? (b) What repairs were made to her at that time? (c) If the repairs referred to herein were made in accordance with a survey, annex a copy of the survey; (d) Annex a copy of the bill for repairs rendered at the time of the dry docking referred to herein.

Sixth interrogatory: When was the scow "Cullen No. 32" last overhauled? (b) Annex a copy of the bill for the said overhauling.

Seventh interrogatory: What damages were sustained by the scow "Cullen No. 32" in the year prior to August 13, 1925?

[fol. 26] Eighth interrogatory: Were these damages repaired?

Ninth interrogtory: (a) Annex a copy of the bill for the repairing of the damages referred to in the preceding interrogatory. (b) If the repairs were made in accordance with a survey, enclose a copy of the survey.

Tenth interrogatory: What cargoes had the scow "Cullen No. 32" been carrying in the year prior to August 11, 1925?

Eleventh interrogatory: What are the dimensions of the scow "Cullen No. 32"?

Twelfth interrogatory: What is the carrying capacity of the scow "Cullen No. 32"?

Thirteenth interrogatory: What is the largest load the scow "Cullen No. 32" has ever carried?

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO INTERROGATORIES

Libellant answers the interrogatories propounded to it by respondent, William E. Hedger Company, Inc., as follows:

Answer to first interrogatory: Libellant does not know when the scow "Cullen No. 32" was built but is informed that it was built in 1912.

Answer to second interrogatory: (a) Libellant does not know. (b) Libellant does not know. (c) Libellant does not know. (d) Libellant does not know.

Answer to third interrogatory: Libellant does most of the repair work on its fleet of boats and at least once a year puts each of its boats in dry dock for necessary caulk-
[fol. 28] ing and repairs. Libellant has no record of when repairs were last made to the "Cullen No. 32" or who made them.

Answer to fourth interrogatory: Answered in answer to Third Interrogatory.

Answer to fifth interrogatory: Answered in answer to Third Interrogatory.

Answer to sixth interrogatory: Answered in answer to Third Interrogatory.

Answer to seventh interrogatory: Libellant does not know.

Answer to eighth interrogatory: All repairs of damages to the "Cullen No. 32" were promptly made.

Answer to ninth interrogatory: Libellant does not know where the repairs were made.

Answer to tenth interrogatory: The "Cullen No. 32" had been carrying all kinds of bulk deck cargoes.

Answer to eleventh interrogatory: Length—112 feet. Beam—33 ft. Depth—12 feet.

Answer to twelfth interrogatory: About 600 tons.

Answer to thirteenth interrogatory: Libellant does not know.

Macklin, Brown, Lenahan & Speer, Proctors for Libellant. Office & P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

[fols. 29-54] STATE OF NEW YORK,
County of New York, ss:

J. Dudley Eggleston, being duly sworn deposes and says that he is a member of the firm of Macklin, Brown, Lenahan & Speer, proctors for the libellant in this action; that he has read the foregoing answers to interrogatories and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the reason this verification is made by deponent and not by libellant is that the libellant is a corporation, no officer of which is within this district and the jurisdiction of this Honorable Court; that the sources of deponent's knowledge and the grounds of his belief as to the matters and things therein stated to be alleged on information and belief are had from correspondence, documents, etc., in his possession.

Sworn to before me this 12th day of November, 1930.
——, Notary Public, No. —, —— County.

[fol. 55] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Admiralty 98/138

In the Matter of the Petition of the CULLEN TRANSPORTATION COMPANY as Owner of the Cullen Deck Scow "Cullen No. 32"

Admiralty 91/392

LONG ISLAND RAILROAD COMPANY

against

CULLEN TRANSPORTATION COMPANY

Admiralty 93/381

CULLEN TRANSPORTATION COMPANY, as Owner of the Deck Scow "Cullen No. 32,"

against

WILLIAM E. HEDGER & COMPANY, INC., PORT FUELING CORPORATION

Admiralty 97/186

WILLIAM E. HEDGER & COMPANY, INC., as Bailee,

against

The Scow "CULLEN 32," CULLEN TRANSPORTATION COMPANY, INC., and PORT FUELING CORPORATION

Case

Before Hon. John M. Woolsey, U. S. District Judge

New York, November 13, 1930—2:30 P. M.

APPEARANCES

Messrs. Macklin, Brown, Lenahan & Speer, by J. D. Eggleston, Esq., of counsel, for Cullen Transportation Company.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, by P. F. Shortridge, Esq., of counsel, for the Long Island Railroad Company.

Messrs. Single & Single, by T. H. Middleton, Esq., of counsel, for Hedger Transportation Co., Inc., demise charterer of scow.

Messrs. Foley & Martin, by J. A. Martin, Esq., of counsel, for Port Fueling Corporation, stevedores engaged in unloading scow.

[fol. 56] The claims of the petition and answers are stated.

Ownership and incorporation of the parties are admitted.

It is stipulated that the testimony be used in all the four suits, and that Hedger, as demise charterer, was bailee.

TESTIMONY FOR THE PETITIONER

ERNEST D. SWEET, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Mr. Sweet, what is your occupation?

A. Superintendent of the marine department.

Q. Of what company?

A. Cullen Transportation.

Q. And how long have you been connected with that company?

A. Since 1917.

Q. How long have you been superintendent of the marine department?

A. Since 1924.

Q. Did the Cullen Transportation Company own the deck scow No. 32 in August, 1925?

A. It did.

Q. How long had that company owned the scow, to your knowledge?

A. Oh, I don't know; I know they owned her in 1918, but prior to that I don't know.

Q. On August 11, 1925, did you charter the Cullen No. 32 to the W. E. Hedger Company?

A. I did.

Q. What kind of a charter was that?

A. The ordinary oral charter, over the telephone.

Q. Used in the harbor?

A. Yes, sir.

[fol. 57] Q. Taken over the telephone?

A. Yes, sir.

Q. Subsequent to the charter of the boat was the boat delivered to the Hedger Company—did the boat go under charter to the Hedger Company?

A. Prior to August 11th?

Q. No——

A. The same day, yes.

Q. Where was the boat when she went under charter?

A. The south side of East 29th Street.

Q. Did you see the boat yourself before she went under the charter?

A. Yes.

Q. And when was that with respect to the time that she went under charter?

A. In the morning of August 11th.

Q. The same day?

A. Yes.

By the Court:

Q. Was she light then?

A. Yes, sir.

Q. Describe her?

A. Oh, she is 112 feet long, 33 feet wide and 12 feet sides.

Q. Flat bottom?

A. Yes, sir, a deck scow.

Q. That is, she was covered over—when you say a deck scow—had she hatches?

A. No, the cargo is all loaded on the deck; there is no house on her.

Q. So that beneath the deck, inside of b r hull was——

A. A space, she doesn't carry no cargo there.

Q. And she doesn't have any ballast or anything?

A. No, she has no ballast.

Q. She is only a floating box?

A. Yes.

Q. You couldn't see inside of her when you saw her?
A. Yes, I went down in her.
Q. You went down in her on the morning of August 11th?
A. Yes, sir.
Q. Well, what about it?
A. I beg pardon?
Q. Tell me about her inside?
A. Well, she is what they call a partition boat, see; [fol. 58] she has two partitions run diagonally through her, fore and aft.
Q. You don't mean diagonal?
A. Fore and aft, rather.
Q. Does that divide the space below in her into three parts?
A. Into three parts.
Q. All right, go on. Did you go into the partitions?
A. I went into the two outside ones.
Q. And what was their condition?
A. All right.
Q. What about her arrangements for pumping?
A. She has two 3-inch Edison hand pumps, one on each end.
Q. You didn't go into the center?
A. I went through the center after going through the two sides.
Q. So that you say before she went under charter on August 11th you had gone through each of these three divisions of the inside of the scow?
A. Yes, sir.
Q. How did you get down to them?
A. In a hatch; in the bow there is a hatch on each end of it; you go down through.
Q. And what was the condition of them?
A. All right.

By Mr. Eggleston:

Q. Did you examine the outside of the scow?
A. You mean outside——
Q. You say you went down through the scow; did you look her over on the outside?
A. Yes, sir.

By the Court:

Q. How much water did she draw when she was light, like that?

A. Well, I couldn't say as to that just exactly how much she would draw.

[fol. 59] Q. You must have some idea, 12 foot sides——

A. About 25 inches, I should say, or 20 inches, something like that.

Q. Well, call it 2 feet?

A. Yes.

Q. That is fair, isn't it?

A. Yes, sir.

Q. All right, go on.

By Mr Eggleston:

Q. You said you looked over the outside; what was the condition of that?

A. All right.

Q. When you examined the inside of the boat was there any water in her?

A. No, there was no water to speak of.

Q. Was she leaking?

A. No.

Q. What was the general condition of the boat?

A. Good.

Q. Who was the captain of the Cullen No. 32 when she went under charter?

A. Emanuel Santos.

Q. How long had he worked for the Cullen Transportation Company?

A. About four years.

Q. As captain of No. 32 and other scows?

A. Yes.

Q. How did you find his work during that time as a scow captain?

A. All right.

The Court: How long had he worked there?

The Witness: About four years.

The Court: He doesn't live on this scow, of course?

The Witness: Yes, he does.

Mr. Eggleston: They have a small cabin on the after end of the scow and the scow captain lives aboard.

[fol. 60] Q. What equipment did the scow have?

A. We have seven lines on there, all the regular general equipment of the scow, two 5-inch lines and two 4½-inch lines, two 7-inch lines and a running line about 3¼.

Q. What was the condition of the equipment?

A. All right.

Q. Did this scow have the equipment customarily and generally found on boats of that kind?

A. She did.

By the Court:

Q. What sort of place did she have to fasten the ropes to, and where were they?

A. She had three bitts on the side and two center bitts forward.

Q. Were those close together?

A. Yes.

Q. Did the three bitts on the side divide the side into three parts?

A. Into three parts; they were about equal, see.

Q. And how about the center bitts forward; were they about in the center?

A. They are about in the center with the bitts in between, towing bitts.

Q. That is the opposite end from the house, is it?

A. Yes, it is on what we call the bow.

By Mr. Eggleston:

Q. Did you see the scow captain before the scow went in charter to Hedger?

A. Yes.

Q. Did you give him any orders?

A. Only that he was going under charter, and to stay on his boat; I didn't know what time the tug would be after him.

Q. Did you give him any further order?

A. No.

[fol. 61] Q. Do you give the orders of the Cullen Transportation Company to the captains of the boats that they operate?

A. Yes.

Q. What orders, if any, had you given to the No. 32 prior to her going under charter?

A. Well, nothing any more than to stay on his boat, and if there was anything the matter, any damage, or if his boat was leaking, or if he was short of lines or anything of the kind, report it to me; that is all I told him.

Q. Do the orders to the captains of the Cullen boats originate with you?

A. Yes, sir.

Q. Do you give them any orders with respect to the loading of the cargo?

A. No.

Cross-examined by Mr. Middleton:

Q. Mr. Sweet, are these fore and aft partitions on the No. 32 supposed to be watertight?

A. Well, now, I couldn't say positively whether they are or not.

Q. Well, I didn't ask you whether they were or not; I ask you if they were supposed to be?

A. I don't know.

Q. Is the purpose of them to prevent too much water entering the boat, if the boat should start or just to give structural strength?

A. No, they are just to give the boat structural strength.

Q. Have your boats rakes at each end?

A. Yes.

Q. What is the angle of the rake at the——

A. I can't say.

Q. Is it an angle of 45 degrees?

A. I can't tell.

By the Court:

Q. You must have some idea, you have been there so long, is it perpendicular like that or is it like that (indicating)?

[fol. 62] A. It is like that (indicating about 45 degrees).

Q. Now, when you examined this boat on the south side of 29th Street, was it dark down in the hold?

A. Yes.

Q. Did you have a light?

A. I had a flashlight.

Q. Electric flashlight?

A. Yes.

Q. And you took it and flashed it and looked all around?

A. Yes, sir.

Q. Tell us just exactly what you did when you made this examination?

A. Well, I was down in there and I looked at her deck beams to see if they were——

Q. That is the beams, the upper beams on the deck?

A. Yes; and I looked at her sides to see if there were any leaks in her sides or if she had any planks broken.

The Court: Did you find any?

The Witness: No, sir.

The Court: When you walk around on the bottom, I suppose they are always a little damp?

The Witness: Yes, there is always a little dampness there, but there was no leaks there.

Q. How much water was there?

A. I am not prepared to say; they always have a little water, any wooden boat carries a little bilge water in there.

Q. Well, she had a little water in there?

A. Yes, she had a little bilge water in there.

Q. Now, Mr. Sweet, can you tell us how long No. 32 had been on the south side of 29th Street before she was delivered to Roosevelt Street?

A. Not positively, but not a great while.

[fol. 63] Q. Well, how long do you think?

A. Well, I am not prepared to say positively.

Q. You don't know at all?

A. No.

Q. But the whole time she was lying there she was light, was she?

A. Yes.

Redirect examination:

By Mr. Eggleston:

Q. What had the Cullen No. 32 been doing just before she went under charter to Hedger?

A. Carrying general cargo, bricks, ashes, lumber.

Q. Had she been operating continuously carrying cargo?

A. Yes.

Cross-examined by Mr. Shortridge:

Q. Do you know, Mr. Sweet, definitely, what particular cargo she was carrying immediately before this?

A. No, I am not prepared to say that.

Q. Do you know whether the cargoes were light or heavy?

A. The only thing I can tell you is that she was in general cargo.

Q. Do you know whether her cargoes were light or heavy?

A. No, not just prior to her going in that charter.

Q. Do you know whether she was fully loaded at any of these periods immediately before this?

A. No.

Cross-examined by Mr. Martin:

Q. On the deck of this boat there are bulkheads, aren't there?

A. Not on the deck, under the deck.

Q. I am not talking about the bulkheads that support the deck, at each end of the deck there are cargo bulkheads, aren't there.

A. Yes, sir.

[fol. 64] Q. And how high are they?

A. They go about 10 feet.

Q. And that is for the cargo to be piled in behind those bulkheads——

A. (No answer.)

The Court: Do you mean there are high bulkheads at each end?

The Witness: Yes, sir.

Q. And that is to have the cargo piled in——

A. That is to keep the cargo from sliding over from her bow and stern deck.

Q. How far is the forward bulkhead from the bow?

A. From the bow it is about 10 feet if I remember rightly.

Q. And what do you say the after one is——

A. About the same.

Q. The stern cargo bulkhead is about immediately forward of the cabin, isn't it?

A. Yes.

Q. And about what distance from the extreme stern of the boat, not from the cabin?

A. Well, I should say from 10 to 12 feet.

Q. She is what is known as a 700 or 800 ton boat, then, isn't she?

A. I don't know what her carrying capacity is.

Q. You are the superintendent for Cullen and have been since 1918 and you don't know that?

A. I said I was the marine superintendent from 1924.

Q. All right; when did you become superintendent?

A. 1924.

Q. What month?

A. I don't know just exactly what month it was.

Q. How long have you been around scows?

A. Well, I have been around them since 1918.

Q. What was your connection with them in 1918?

A. I was assistant to Mr. Sammis at that time.

[fol. 65] Q. Wasn't your duty to see the scows?

A. No, I worked in the office.

Q. And you were an office man up till 1924?

A. Yes.

Q. How long have you been with Cullen?

A. Since 1917.

Q. And you knew this deck scow from 1917? then?

A. Yes.

Q. How long before that——

A. I knew we had such a deck scow.

Q. How long did you know her before 1917?

A. I didn't know anything about her before 1917.

Q. On each side between the bulkheads there are coamings, aren't there?

A. You are talking about the bulkheads that are on deck?

Q. Between the cargo bulkheads on deck and the after bulkheads there are coamings?

A. Yes.

Q. Running fore and aft?

A. Yes.

Q. They are right on the edge of the vessel, aren't they?

A. Yes.

Q. They are right over the edge of the side of the vessel?

A. Yes.

Q. How high are they?

A. 22 inches.

Q. Now, between these coamings and the bulkhead is the cargo space?

A. Yes.

Q. The coamings are likewise to keep the material from running overboard, is that right?

A. That's right.

Q. Was there a captain on board when you examined her?

A. Yes.

Q. Do you know how long he had been on that boat?

A. How long—do you mean the full time he had been on that boat?

Q. Yes.

A. No, I can't exactly say whether it was one or two years that he had been on her.

[fol. 66] Q. Well, to your knowledge had he been on her in 1924?

A. Yes, he had been on in 1924.

Q. You always found him a good man?

A. Yes.

Q. Why did you have to go down and examine this boat both inside and outside if you got no report from your captain of anything wrong?

A. Because I made it a practice on boats I chartered out.

Q. Don't you rely on your captian?

A. To a certain extent.

Q. Now, I suppose—what time did this boat go out in the morning?

A, Morning? She was taken out sometime during the night.

Q. The night of what?

A. The 11th.

Q. Do you know what tug took her?

A. No.

Q. How many boats did you examine that day?

A. Oh, I couldn't answer that.

Q. A great number?

A. No, I wouldn't say—I simply couldn't answer.

Q. How long did it take you to go through it, ten minutes?

A. No, it takes longer than that; it takes three quarters or perhaps an hour.

Q. Now, these pumps you spoke of; there is one fore and aft?

A. Yes.

Q. They are each outside of the cargo bulkhead, aren't they?

A. Yes.

Q. On the extreme corner of the boat?
A. Yes.
Q. One on the starboard side?
A. Yes.
Q. And one on the port side?
A. Yes.
Q. The starboard side pump, is that forward or aft?
A. That is aft.
Q. And the forward pump——
A. Is on the port side, the port corner.

The Court: What are they run by?
The Witness: Hand.

[fol. 67] Q. That is, the captain has to pump?
A. Yes.
Q. Have you any report or do you know the existence of any report, having been an office man up there, of what this boat was doing for the six month prior?
A. No.
Q. There would be such a report in your office, wouldn't there?
A. I daresay there would be.
Q. Well, you know there would be, don't you?
A. Yes.
Q. Have you any record of when this boat was last into any drydock?
A. We make a practice of putting——
Q. I didn't ask you that?
A. Do you mean the positive month or day?
Q. Yes.
A. No, I don't.
Q. There is such a report in existence, is there?
A. I don't know.
Q. You were office man for about seven years and you know that there is a record of when boats go in for repairs?
A. Yes.
Q. And that record is in Cullen's office?
A. Well, we have moved twice since 1925.
Q. But the record was kept during that period?
A. I suppose so.
Q. Have you looked up that record to see when the repairs were made?
A. No.

Q. Where did you make them?

A. Some at Jersey City Drydock and some at Hunts Point Drydock, all bottom work at the drydocks and all top work we did ourselves.

Q. Where was your yard for doing it?

A. 29th Street and East River.

Q. Are you still with Cullen?

A. Yes.

Q. You know where these records are kept, of what service the boats are in, as an office man?

[fol. 68] A. No, I don't know where they are kept, but around the office; only I say we moved twice since 1925.

Q. You don't know of any records being destroyed, do you?

A. I don't know of any being destroyed but I don't know of their being kept.

Q. Now, this coaming you said was about 2 feet?

A. 22 inches.

Q. Is that solid or is it a rail with opening underneath?

A. There are scuppers through the bottom of it.

Q. And otherwise it is a solid rail?

A. Yes.

Q. You don't know of your own knowledge, or you haven't found out how old this boat was?

A. No.

Q. Cullen's business was also a great deal in the coal trade?

A, Yes.

Q. He used this boat quite often for carrying coal?

A. If he had occasion to use it.

Q. That is a deck scow?

A. Yes.

Q. Not a coal boat?

A. Yes.

Q. Now, when you examined this boat she had a draft of anywhere from 20 to 24 inches, you think?

A. Yes.

Q. That would leave about 10 or 11 feet out of the water.

A. Yes.

Redirect examination,

By Mr. Eggleston:

Q. Mr. Sweet, I understood you to say that Cullen's did the top work on their boats. What do you mean by top work?

A. We do all the caulking, all the woodwork that is above the water line, that is, the light water mark. All the bottom work and everything that requires a docking we have to send to a drydock.

[fol. 69] Q. How much of a staff does Cullen maintain to do that work?

A. We have four men there.

Q. And where is that work done?

A. At the foot of East 29th Street.

Q. And where was your office at the time you examined her?

A. At 30th Street.

Q. And the boat was at East 29th Street?

A. Yes, the east side of East 29th Street.

The Court. She was at your own place then?

The Witness: Yes.

Q. Were you asked by me to look up the records to find out when repairs were last made to this boat and when she was last drydocked?

A. Yes.

Q. Did you make an effort to locate the records?

A. Yes.

Q. What did you find?

A. I told you I couldn't find any.

Q. You couldn't find records of the time she was last repaired and going under charter?

A. No.

Q. Do you know what work was done on her before she went under charter?

A. Everything that was necessary——

Motion to strike it out.

The Court: I sustain it.

It is stricken out.

Q. Do you know when she was in drydock prior to going under charter, do you know the date?

A. Now, I do not know the date; the only thing I can tell you about that is that I know it was less than a year.

[fol. 70] By Mr. Martin:

Q. Where did it go to drydock?

A. Jersey City Drydock, I imagine, at that time.

Q. This is your impression; we don't want to get what your impression is. You said she went to the Jersey City Drydock a year before this?

A. I said within a year.

Q. Well, how long before this accident would you estimate it; eight months, ten months, eleven—five months, or what?

A. Well, I couldn't answer positively; I should think about eight months.

Q. And what drydock did you say she went to?

A. The Jersey City Drydock.

Q. Within eight months?

A. Yes.

Q. Did you ask the Jersey City Drydock to furnish you with any record of when she was there?

A. No.

Q. You knew you could obtain that, didn't you?

A. Yes, if I had asked for it.

Q. When I asked you a little while ago about records you said you didn't know if they were in existence or not. Now you just told counsel you looked for them. You didn't tell me that?

A. No, I didn't know whether they were in existence or not.

The Court: Did you have the boat under repairs down at the Jersey City Drydock?

The Witness: No, sir, at Hunts Point Drydock.

The Court: Well, you can find out from there when it was done. You had better get some information on that to show that she was repaired.

[fol. 71] Q. Now, I understand you have no records after searching for them of what repairs your company did above the water line, is that correct?

A. As far as I know.

Q. And you have made a search through the office for them?

A. Yes.

Q. And all of the upper part of the boat was repaired by your own yard?

A. Yes.

By the Court:

Q. You went in there and she was light and drawing 2 feet of water?

A. Yes.

Q. And you saw no leaks?

A. Yes.

Q. You couldn't see the existence of any leaks above that two feet?

A. No, but still——

Q. You looked at it with your flashlight but you don't actually know whether if she had had pressure of cargo on her and been down 6 feet or something like that, leaks would have been coming from any direction?

A. When they come in we search them out.

Q. That is your ordinary practice for the period while she was lying at your home place there; you probably looked through her and saw whether any caulking was necessary——

A. Yes.

Q. You can't say that you did it but you say that is your custom?

A. Yes.

Q. How deep have you seen her loaded; what freeboard would she have with a load that would be safe?

A. I never saw her loaded.

Q. Well, is there anybody connected with your office who knows how deep they load those things?

A. Well, I don't know; you see when we charter those boats out, when we simply charter the boats out——

[fol. 72] Q. When you charter the boats you charter them out——

A. They put a safe cargo on her.

Q. Well, do you mean to say that you never have seen one of these boats with what you regard as a full load on? I just want to get how deep they go?

A. I am not prepared to say that for I never measured them.

Q. I am not asking you for a measurement; you are not an instrument of precision, but you look at one in the water an- you——

A. Well, about 15 inches.

The Court: I will say, "sometimes we load these deck scows and submerge them so their freeboard is only 15 inches" you say.

The Witness: 15 or 18 inches.

By Mr. Eggleston:

Q. Mr. Sweet, when you examined the outside of this boat before she went under charter did you look at the caulking?

A. Well, to a certain extent, yes.

Q. What was the condition of the caulking?

A. Very good; I simply told our caulker to go over and if there were any — or anything of that kind to caulk her up.

By the Court:

Q. Was this before or after the charter?

A. Before.

Q. How soon before?

A. It may have been a couple of days; when he used to come in there I would send him down.

[fol. 73] Q. When the boats came back from charter you would have one of your own men look her over and see what happened to her in the meantime?

A. Yes.

By Mr. Eggleston:

Q. And what was the condition of the caulking when you examined her?

A. All right.

By Mr. Martin:

Q. Were you up on the deck of the boat when you looked at the sides?

A. Yes.

Q. And one side was up against the dock or the pier?

A. Yes.

Q. And the other side was up against another boat?

A. No.

Q. And all you could do was to look down on one side and from there you said the caulking was good?

A. That is as far as I could see.

By Mr. Middleton:

Q. Mr. Sweet, when you speak of the water line you mean the light water line?

A. Yes, sir.

Q. You made all repairs above the light water line?

A. Yes.

Q. So that the Cullen Company wouldn't have any record of repairs made below the light water line?

A. No.

[fol. 74] EMANUEL SANTOS, being duly sworn and examined as a witness for the petitioner, testified:

Direct examination.

By Mr. Eggleston:

Q. Were you captain of the Cullen No. 32 in August, 1925?

A. Yes.

Q. Do you remember this scow being loaded with ore and turning over?

A. I do.

Q. At Roosevelt Street?

A. Yes, sir.

Q. You were captain of her at that time?

A. I was the captain.

Q. How long had you been captain of deck scows prior to that?

A. Well, I was on her about a year.

Q. And had you been on other deck scows?

A. Yes, I was on other boats for the same company.

Q. And how long were you with the Cullen Company as Captain of deck scows?

A. Well, I judge it was about four years.

Q. Do you work for the Cullen Company now?

A. I am not working for them now.

Q. What is your present occupation?

A. Mechanic's helper.

Q. Whom do you work for now?

A. I work for the Arbuckle Sugar Refining Company.

Q. And when did you leave the employ of the Cullen Company?

A. Well, I didn't leave—the same year.
Q. The same year?
A. Yes, sir.

The Court: Right after the accident?
The Witness: Yes.
The Court: What happened to you?
The Witness: I went to a coal boat two or three months.

[fol. 75] Q. After the accident, for one of Cullen's coal boats?
A. Yes, and worked for two or three months.
Q. You were captain of one of Cullen's coal boats for several months after this accident?
A. Yes, sir.
Q. Did you get in the river after the accident occurred?
A. No, sir, for I jumped out.

By the Court:

Q. Jumped out where?
A. I jumped out and another fellow from the same company hollered to me; I was in the cabin doing some painting and when she was going over he hollered to me and I jumped.
Q. Where did you jump to?
A. To the deck. I called to the engineer to take some cargo off and protect her so she wouldn't sink but he wasn't there, he had gone ashore for his lunch. And I went ashore myself and phoned to the company and told them the boat was pretty near sinking.
Q. How long did it take her to sink?
A. When I came back she was pretty near sinking and I had only time to cut the line on the bow and said to the other fellow to cut the line on the stern.
Q. How long did it take her to go over?
A. She would take at least twenty minutes.

By Mr. Eggleston:

Q. Where did your boat start out from when she went up to Roosevelt Street to get the load of copper?
A. She started from 29th Street East River.

Q. And how long had you been lying at 29th Street East River?

A. I never laid there long, but two or three days.

[fol. 76] Q. And before you went to 29th Street what was your boat doing?

A. I was towing general cargo, brick.

Q. Did you say you carried brick?

A. Yes, sir.

Q. What was the cargo you carried just before you went to 29th Street?

A. I had just come in with a load of brick.

Q. And how much of a load of brick did you have?

A. Very deep; I don't remember exactly but I know the boat was very deep in the water.

The Court: How near the water would the deck of the boat come?

The Witness: 3½ feet.

Q. And you say you carried other cargo?

A. Yes.

Q. How deep had your boat been loaded on those occasions?

A. All the ways deep.

Q. Full loads?

A. Yes, sir. I had carired brick for two or three months.

By the Court:

Q. Carrying it all the time?

A. Yes.

Q. And what months were they?

A. Well, I wouldn't remember now.

Q. Were they many months before this charter, before August 11th?

A. That was, I guess about—it isn't so many days for as a soon as I came in to 29th Street I had orders to send me out.

Q. Was it bricks you were carrying just before that?

A. Just before that.

By Mr. Eggleston:

Q. And how deep had your boat been loaded when you were carrying bricks before that?

A. Oh, 3 feet and a half.

[fol. 77] Q. From the top?

A. From the water, the head.

The Court: You mean the deck was very close to the water; it would be a foot above the water, the deck itself, if the rail was 3 feet?

The Witness: The deck was a foot and a half above the water.

Q. That is the way you had been loaded?

A. Yes, sir.

Q. When you loaded this ore how deep did they have your boat loaded?

A. Well, she was pretty deep——

Motion to strike it out.

It is stricken out.

The Court: State how deep; was it one foot or two feet, or what?

The Witness: She was about two and a half.

The Court: Just about the same as it was with the brick?

The Witness: Yes, for the cargo was a little heavy.

Q. When she loaded this ore your boat was loaded about the same depth as she had been loaded with brick, was she——.

A. Yes, sir.

By the Court:

Q. Had you almost completed your loading when the accident occurred?

A. Yes, for I knew the load was too heavy and I knew she wasn't complete; they started to load on one side more [fol. 78] so I had to tell the engineer about it and he didn't pay any attention, he said it was all right and the next day then when they finished loading it was about forenoon, it was 11:30, and I told him he had better send a man to straighten my boat up for it was listing too much.

Q. Was it listing away from the hoister?

A. She was alongside the derrick.

Q. If this is the derrick, was your boat slanting away from the derrick or towards the derrick?

A. Just close to the derrick.

Q. But you said—there is the derrick and you said your boat was tipped——

A. Yes, sir.

Q. Now, which way was she tipped?

A. She was tipped that way.

Q. Away from the derrick?

A. Away from the derrick, for when the water came in she——

Q. Now, here is your scow and here is the derrick; now how was your scow; you show me yourself the way your scow was leaning at 11:30 when you saw her there?

A. My scow was leaning that way (indicating away from the derrick).

By Mr. Eggleston:

Q. Now, Captain, what time of day was it that you went from 29th Street up to Roosevelt Street?

A. It was sometime in the night but I don't remember.

Q. And where were you placed when you got up to Roosevelt Street?

A. They put me alongside the derrick.

Q. Alongside of the ship you took ore from?

A. Yes, sir.

Q. Did they do any loading the night you got there?

A. Not until the next morning.

[fol. 79] Q. When did they commence loading your scow?

A. The next morning.

Q. The morning after you got there they started loading?

A. Yes.

Q. What time was it they started?

A. Well, I told you I can't remember whether it was seven or eight o'clock.

The Court: It was when they started work in the morning?

The Witness: Yes, sir.

Q. How were you lying there when they commenced to load you; were you against the slip or was there something between you?

A. I was alongside of the derrick.

Q. And the derrick was alongside of the ship?
A. The ship.
Q. And you were up in the slip?
A. My bow to the ship's stern.
Q. And the ship was in the slip *how* in?
A. Yes.
Q. How long did they load you the first day?
A. Well, the first day they started to load it astern there deep and then they moved to the bow and they loaded it there deep, 9 or 10 feet, and I moved back and put a little pile underneath it, and she had a list on one side.
Q. Which side was she listed on?
A. The bow.
Q. Was it away from the derrick or towards the derrick?
A. Away from the derrick.
Q. What time did they knock off work the first day?
A. Oh, about five o'clock, I think.
Q. At noon?
A. At noon.
Q. Did they work in the afternoon?
A. They quit about five.
[fol. 80] Q. They quit then at five in the afternoon?
A. Yes, sir.

The Court: Did you have a list that afternoon away from the derrick?
The Witness: Yes, I had the first day.

Q. Did you stay on the boat that night?
A. Sure.
Q. Slept on the boat?
A. Slept on the boat.
Q. Before you went to bed that night or at any time, did you look at the boat to see if she had any water in her?
A. Yes, I looked to see if she had any water.
Q. When was that?
A. Before I went to bed.
Q. When your boat went up there to take on this load of ore what condition was she in?
A. O. K.
Q. Did she leak much?
A. No- much.

Q. How often would you have to pump?

A. Once a week.

Q. And how long?

A. About eighteen minutes; she never leaked much when I was there.

Q. Did she leak any more than the ordinary wooden deck scow?

A. She never leaked.

Q. You say they knocked off over night and you slept aboard your boat?

A. Yes, I did.

Q. Now, what was done the next day, the following day?

A. The next day in the morning they started to load again and I said to the engineer, "You had better send a man to trim the cargo," for she was listed so much on one side.

The Court: What morning was that?

The Witness: The 13th.

[fol. 81] Q. Was that the morning that she spilt her load?

A. That was about twelve o'clock, yes, the morning she spilt her load.

The Court: Where was the engineer—how did you hail the engineer?

The Witness: He was on duty——

The Court: On the derrick?

The Witness: Yes, sir.

The Court: You told him what?

The Witness: The day before, to send a man to straighten the boat for she was badly loaded, so he said that she was all right; well, anyhow, about half-past eleven I hollered to him and he said, "Oh, the boat is all right."

Q. Who said that; repeat what was said?

A. I said to the engineer on the derrick, I said to him, "You had better send some men to straighten this cargo," and he said she was all right.

The Court: Had the list gotten worse?

The Witness: Yes.

The Court: From the loading that was done that morning?

The Witness: Yes.

Q. And how was the list then?

A. The list was the same side.

The Court: And worse?

The Witness: And worse. And the cargo slide down.

The Court: What is the texture of that cargo, is it sticky cargo that holds an upright position or is it like sulphur or——

[fol. 82] The Witness: It is something like mud.

The Court: Sticky?

The Witness: Yes.

The Court: So when you put it in one place it takes a good deal of a tip to slide it to another place?

The Witness: Yes.

The Court: If you put a lot of this cargo in one place you have to tip it a good deal to make it slide at all?

The Witness: It is like dirt—it is a thing that slides all the time.

The Court: It will slide easily?

The Witness: Yes. I said the color was like mud.

Mr. Martin: It is perfectly dry, your Honor, like dust, with lumps in it.

By the Court:

Q. Would you have been willing to sleep the night on her the way she was that morning?

A. Well, I had to be there to see what would happen.

Q. I mean the way you saw it that morning would you have been afraid to spend the night, the way she was then?

A. Well, something had to be done, I had to tell my company.

Q. I asked you whether you would have been willing—after all no one wants to be drowned like a rat on one of those things—you wouldn't have wanted to sleep on her the way it was that morning at 11:30?

A. No.

Q. And you did sleep there the night before?

A. Yes, sir.

Q. And it wasn't so bad then?

A. No, sir.

[fol. 83] By Mr. Eggleston:

Q. What did you do after you spoke to the engineer about 11:30 or twelve o'clock, and asked him to trim the cargo and he said it was all right?

A. He said it was all right and then when I went to my cabin I went around and looked her over and she hasn't much water then.

Q. Did you look down below?

A. Yes, sir.

Q. Did she have any water in her?

A. No. And I went in my cabin to finish my painting, and she was sinking——

Q. What do you mean by that?

A. Sometimes when a boat passes, do you understand, and the cargo commenced coming down all the time on the same side.

Q. The offshore side?

A. Yes.

Q. Did you come out of your cabin?

A. Well, I was there and I couldn't pay attention and I heard someone holler to me, it was the deckhand of the 36, and I jumped to the deck and she was pretty near going; I jumped on the derrick and then I tried to call the engineer and he wasn't there; I went to the ship then and someone told me the engineer went ashore for his lunch.

Q. What did you do then?

A. I run up to the dock and called my people and let them know the condition in which she was and when I come back she was pretty near over.

Q. Had some of the cargo gone off of her?

A. Yes, most of it had gone, and then there was a fellow and he said, "Go and cut your line on the bow."

Q. What fellow was that?

A. It must have been someone off the derrick.

[fol. 84] Q. Someone from the derrick?

A. Yes, and he cut the stern line.

Q. And what did you do?

A. I cut the bow line.

Q. Why did you do that?

A. To prevent her carrying the derrick with her.

Q. And then what happened to the scow?

A. Then she turned over.

Q. Were there any officers of the Cullen Company or any of your bosses on the boat there while you were loading?

A. No, there wasn't.

Q. Did any of your bosses or any of the officers give you any orders as to the loading of cargo?

A. Absolutely not.

Q. Did you have anything to do with loading the cargo?

A. I had nothing to do with the loading of cargo except take the care of my boat.

Cross-examination.

By Mr. Middleton:

Q. When you were taken in tow at 29th Street and towed down to Roosevelt Street were you awake?

A. Yes, sure.

Q. Did you have any difficulty?

A. No.

Q. And tied up alongside the derrick?

A. Yes, sir, I had to be.

Q. Were you lying in the slip bow in or bow out?

A. I was in the slip bow in.

Q. You were bow in?

A. Yes.

Q. Now, this derrick, is that the derrick of the Port Fueling Corporation—

Mr. Middleton: Is it admitted——

Mr. Martin: The derrick on the second day alongside of this boat which was being loaded is admitted to belong to the Port Fueling Corporation.

[fol. 85] Q. Were you alongside the same derrick the day they loaded you?

A. Yes.

Q. Did anybody at all deal with your boat when you were there other than those in charge of the derrick?

A. No.

Q. They were the only people that dealt with your boat at all; that is right, is it?

A. Yes, sir.

The Court: The same derrick both days?

The Witness: The same derrick.

The Court: And the same men?
The Witness: The same men.

Q. And you are quite sure there was nothing happened to her until she sank?
A. There was nothing happened to her until she sank.

Cross-examination.

By Mr. Martin:

Q. Do you remember going alongside of the U. S. derrick No. 2 opposite the second hatch on August 12th?
A. Yes, I do remember.
Q. And on August 13th do you remember being shifted down alongside of the Port Fueling derrick No. 2 to finish loading?
A. On the No. 2?
Q. Yes, from U. S. Trucking No. 2 derrick unto the Port Fueling derrick No. 2?
A. I don't remember.
Q. Will you say you weren't?
A. I remember I was alongside of one derrick and the same derrick that finished me out.
Q. What hatch were you loaded out of?
A. I don't know.
Q. Don't you remember taking part of your cargo out of the bow of the ship and then being later shifted to the [fol. 86] stern?
A. I don't remember nothing like that.
Q. Will you say you weren't?
A. I don't know; I was alongside of the ship when they were loading.
Q. Were you shifted from No. 2 hatch alongside one derrick down to No. 4 hatch alongside another derrick?
A. I couldn't tell you that.

By the Court:

Q. Now supposing this was a ship here. You have a hatch of the ship here and a hatch of the ship here (indicating); was there more than one derrick when you got alongside there?
A. There was only one, I remember one.

Q. Now, what this gentlemen is asking you in effect is roughly this: When you first went in there whether you weren't alongside of the derrick like that, with the ship bow in towards the dock, the first day, August 12, and then you moved back, were pulled along by the ship's lines or something like that, and put alongside of the derrick on the second day; do you remember anything like that?

A. I don't remember.

Q. You think you only saw the one derrick?

A. Yes, sir.

Q. And you think you were alongside the same derrick all the time?

A. I think so.

By Mr. Martin:

Q. Do you know what a crane is on a derrick?

A. A crane?

Q. Yes.

A. No.

Q. Do you know what an A-frame is?

A. No.

[fol. 87] Q. That boat that loaded you the first day had an A-frame?

A. I don't know anything about it.

Q. And on the second day the boat that loaded you hadn't an A-frame?

Objected to.

A. I don't know anything about it.

The Court: It is all right on cross examination.

Q. I understand you to say that you saw the boat was going over and you went out to phone to your people?

A. Yes, I did.

Q. How long had it been going over before you left your boat?

A. Well, it was about twenty minutes at least.

Q. And then you left your boat?

A. It was about twenty minutes when I went and called up my people, twenty minutes when I went and come back.

Q. How long did you notice your boat was turning over before you left your boat to call up your people?

A. Well, as soon as the man called me up.

Q. Well, give it to me in minutes or hours or whatever it was, how long did you see your boat turning over before you left your boat to call them up?

A. As soon as the man called me up I jumped on the deck.

Q. What man?

A. The man on the 36.

Q. Where were you?

A. In the cabin in my place.

Q. How did you get off your boat?

A. I jumped on the derrick.

Q. Then where did you go?

A. Then to the steamboat.

[fol. 88] Q. On the steamer?

A. Yes.

Q. How did you go up the side of the steamer?

A. Up the ladder.

Q. And then you get on the dock?

A. Yes.

Q. And where did you go on the dock to telephone?

A. I went somewhere to call him up.

Q. Up to the street?

A. The house is right on the end of the dock.

Q. What house?

A. Where the telephone is.

Q. Do you know there is a telephone on the end of that dock?

A. It is somewhere there.

Q. The telephone you went to was up on the street, you had to walk the length of the dock?

A. Then I went to the street to call him, it was not there.

Q. I am not asking you that; you went to the street?

A. Yes.

Q. Came back?

A. Yes.

Q. Climbed up on board the steamer?

A. Yes.

Q. Down onto the deckload and down onto your boat again?

A. And when I came back I didn't get on my boat.

Q. I thought you said that?

A. No, I meet the man, understand, all ready to cut the line, so he told me to run up to the bow and cut my line and let the boat go and that is what we do.

Q. And when the line was cut on the derrick the boat turned over?

A. Yes, sir.

Q. Do you remember at 11:45 that day you were notified that a tug was going to tow you out and you left your boat and went up and got lunch?

A. Who, me?

Q. You?

A. Not a bit.

Q. Didn't you tell the engineer that you were going up [fol. 89] to get lunch so you will be ready to be towed away?

A. No, I haven't spoken to the engineer only to tell him to have the cargo straightened.

Q. Now, on the 12th it was loaded with a big list to starboard, is that right, or listing offshore?

A. Yes.

Q. Did you make any complaint that day?

A. I did make a complaint the first day.

Q. Do you see any man in the room that you complained to?

A. In the room here—I don't recognize him; there is a man there that looks like his engineer.

The Court: Which man do you mean?

The Witness: The man with the mustache there.

Mr. Martin: Mr. Eberle, stand up. (To a man in the back of the courtroom.)

The Witness: The one back of the man with the mustache.

Mr. Martin (to another man in the back of the court room): Will you stand up. Is that the man?

The Witness: It seems to me it looks like him but I don't know the man.

Q. Did you speak to the same man on the first day that you spoke to on the second day?

A. Yes.

Q. There is no doubt about that?

A. No doubt.

Q. You were still in the same place?

A. I was still in the same place.

Q. And alongside of the same derrick?

A. Alongside of the same derrick.

Q. What did you say to him on the first day?

A. What is that?

[fol. 90] Q. What did you say to this engineer on the first day?

A. I told him to straighten my boat, to put the cargo right, that the cargo was wrong.

Q. What did he say to you?

A. He said it was all right.

Q. What did you say?

A. Well, I had nothing to say, I couldn't go there and shove it out myself.

Q. Did you go and complain on the first day to your owner?

A. To where?

Q. Did you go and telephone to your owner that you weren't being properly loaded?

A. No, I am not supposed to.

The Court: You didn't?

The Witness: No.

Q. How much of a list did you have the first day?

A. Well, I had quite a big list but I don't know how much.

Q. It looked dangerous?

A. Sure; I knew it was dangerous.

Q. You were in danger the first day with a heavy list?

A. Yes.

Q. You slept there the first night?

A. I did sleep there.

Q. You were afraid she would go over?

A. Well, I have to look out for myself.

Q. I suppose you stayed dressed that night, ready to go off if the boat went over?

A. I can't say that I stayed dressed.

Q. You didn't go away the first day, did you?

A. I did remain on the boat.

Q. And all that night?

A. All that night.

Q. And all next morning?

A. And all next morning.

[fol. 91] Q. And anybody could see that it was a dangerous list on the first day?

A. Well, I see it right away and I told the engineer.

Q. And you were fearful it would go over then?

A. I told him to straighten it, for I always want it straightened.

Q. And he would do nothing for you?

A. He would not.

Q. The second day the same engineer?

A. The same engineer.

Q. And the same place they continued to lead material on that side of the boat, is that right?

A. Only they moved the boat back and forth.

Q. Oh, they moved the boat back and forth?

A. Well they had to for the different hatches.

Q. Did they move it back and forth by the derrick?

A. They have to, to put the cargo in different places.

Q. Did they have it away from the derrick?

A. She was alongside the derrick all the time.

Q. But they moved it up and down to distribute the cargo in the boat?

A. Yes.

Q. And they continued to put the material on the offshore side?

A. They put some of it on the offshore side, of course.

Q. Did they put any on the inshore side?

A. Yes, but they put more on the offshore side.

Q. They continued piling more on the offshore side than on the inshore side, is that right?

A. Yes.

Q. Was there any man down on the boat?

A. Nobody.

Q. What kind of a bucket were they using?

A. The bucket, I don't know the name of it; it goes up and opens itself.

Q. It opens up like an orange peel?

A. No, like a clam shell or something.

[fol. 92] Q. How do they open it?

A. By the steam, I suppose.

Q. Well, do you know?

A. Well, I suppose I know, for I see them working by the steam.

Q. And there was nobody from the loading come down on your boat?

A. I didn't see no one.

Q. You didn't see anyone there?

A. No.

Q. Did you ever see that colored man (indicating a man in the back of the court room)? Stand up, please.

Whereupon a man in the back of the courtroom stands up.

The Court: Do you know him?
The Witness: I don't remember seeing him.

Q. Didn't you see him working on the deck of the boat, knocking the pin out to empty the bucket?
A. I don't remember.
Q. You don't remember?
A. No, I am not supposed to know anything about it.
Q. Now, all the morning of the 11th they continued putting material on?
A. Yes.
Q. Your boat continued listing more offshore—on the 13th, is that right?
A. That's right.
Q. That is the day she tipped over?
A. Yes.
Q. And she kept going down all the time?
A. She kept going down all the time.
Q. And how far down did she get on that side?
A. Well, she went down until the head went down in the water.
Q. Well, when they stopped loading her was she 3½ feet on that side?
A. When they stopped to load?
[fol. 93] Q. Yes?
A. It was about 3½ feet.
Q. On that side?
A. Yes, sir.
Q. How much on the other side?
A. On the other side I guess it was about 6, something like that.
Q. 6 or 7 probably?
A. Yes.
Q. So she was listing right over?
A. Yes, she was listing too much.
Q. So that she was tipped right over?
A. Yes.
Q. So one side she had only 3½ feet out and the other side she had 6 feet, is that correct?
A. Yes.

Q. Would you say she had 7 feet on the other side?

A. I don't know how many feet she had.

Q. That was really a terribly dangerous condition, wasn't it?

A. Well, sure.

Q. And you asked the engineer, with that terrible condition on there, to do what?

A. To straighten the boat up.

Q. To straighten the boat up?

A. Yes.

Q. He would have had to put half of your cargo over on the other side—It would take about half that was on one side——

A. The boat alongside was standing in the way.

The Court: Do you mean the water was 3½ feet below the edge of the rail as you looked over the side——

The Witness: Yes.

The Court: You don't mean the rail—do you mean the water was 3½ feet below the rail?

Mr. Martin: That isn't his testimony, your Honor.

The Witness: It is.

[fol. 94] Q. You told your counsel on direct examination when you finished loading your deck was 3½ feet above the water, didn't you?

A. My counsel?

Q. Yes.

The Court: He is your counsel, Mr. Eggleston.

Mr. Eggleston: He said no such thing.

Q. Did you tell him the boat was loaded on this occasion the same as others with your deck 3½ feet out of water?

A. I don't remember.

Q. You don't remember?

A. No. I didn't say anything like that.

Q. Well, let us get it now; do you remember telling your counsel this boat was loaded about as deep as it was the time you carried your brick?

A. Yes.

Q. And you told him that then your deck was 3½ feet out of water?

A. I told him always before when I had this cargo always she had been loaded 3 feet and 3 inches, something like that.

Q. Didn't you tell your counsel this time that she was loaded as she was before?

A. That is what I told my counsel.

Q. And that is, that your tug was 3½ feet out of water?

Objected to.

The Court: He can ask him anything on cross-examination.

Q. Wasn't that your testimony? Well, isn't that what you mean?

A. What do you say?

Q. That your tug was 3½ feet out of water?

A. The same as the last, she is very heavy then.

[fol. 95] Q. If you will answer my question—you told your counsel, when you finished loading on the morning of the 12th that your deck was 3½ feet out of water; is that correct?

A. Well, I said it was the same.

Q. The same as what?

A. It was the same as I told my counsel.

Q. Well, is that correct; that your deck was 3½ feet out of water when you finished loading that morning?

Mr. Eggleston: I object to the question.

The Court: You understand your vessel had a rail up like that (indicating)?

The Witness: Yes.

The Court: When you say it was 3½ feet out of water do you mean the water was 3½ feet below this rail or 3½ feet below the deck?

The Witness: It was 3½ feet below the deck; that is what I mean, sir.

Q. And on the other side was she about the same?

A. She couldn't be, for she had a list; how could she be?

Q. How many thousand bricks did you carry on that boat?

A. I don't remember. I never take any interest in that.

Q. You didn't do any pumping on the 12th or 13th, did you?

A. On the 13th?

Q. On the 12th or 13th?

A. I didn't have to do much.

Q. Did you or did you not do any pumping?

A. I didn't; I went there and looked and there was no water, the water went in when she commenced to go so——

[fol. 96] Q. Now, you said about twelve o'clock or something, your boat got a little swell; what did you mean by that?

A. A little swell? I didn't say that. I said every time a steamboat passed she gives a little swell and she swings a little; every time she swings a little, the cargo comes down all the time.

Q. Is that the time she took the list?

A. That is the time she took the list, that she went.

Q. When these swells came by?

A. When the swells come by she had a big list, and that is when she went.

Q. You have carried coal on that boat?

A. I don't remember carrying any coal while I was there.

Q. Do you remember carrying anything but brick?

A. I carried lumber.

Q. That is a light load?

A. Yes.

Q. Brick is a light load?

A. No.

Q. It is a heavy load?

A. Yes.

Q. You have often seen scows of that kind loaded with sand and gravel?

A. Yes.

Q. And they were loaded within 6 inches?

A. Yes, so if that boat——

Q. Have you had it loaded down even with the deck?

A. Many times.

Q. So that this boat, you have had loads in it so the deck would be even with the water?

A. Yes.

Q. And you have often had that?

A. Yes.

The Court: He had described a 15 degree list.

Q. Up until the lines were cut none of the cargo had gone overboard, had it?

A. Plenty had gone for the water was in the boat already in the deck and plenty of cargo has gone already.

[fol. 97] Q. The water when you cut your lines was up on your deck?

A. Well, of course, because she listed.

Q. When you cut your lines the water was up on the deck?

A. Before I did cut the lines the water was up there.

Q. Was it over your rail?

A. Why, sure.

Q. And how far over your rail was it?

A. It was on the cargo.

Q. It was up on the cargo?

A. Yes.

Q. What was your purpose in cutting the lines?

A. Well, I had to cut the line to prevent the derrick going with her.

Q. The derrick people didn't ask you to cut them, did they?

A. Well, when I went up one of the men at the line cut it already.

Q. What man?

A. One of the men on the derrick.

Q. He had the stern line cut already?

A. Yes, and he hollered to me to cut the other.

Q. You were going to be towed that day right after lunch?

A. They told me they were going to tow me.

Q. Who told you that?

A. The engineer said I was going to be towed all right in a minute, that is the reason he said there was no use to fix it.

Q. No use to fix it with the boat lying over on its side, is that what you mean?

A. Yes.

The Court: When you spoke to the engineer in the morning——

The Witness: He said, "Oh, you're all right, you are ready to go."

Q. Were they finished loading when you asked him to straighten up the load and send a man, after that was the [fol. 98] time he told you that you were going to be towed

out and there was no need of straightening it up, is that correct?

A. Yes.

Cross-examined by Mr. Middleton:

Q. You testified a while ago that in the course of being loaded you were shifted back and forth along the derrick, that is right, isn't it?

A. Yes.

Q. Who did the shifting?

A. Some of the men, I guess.

Q. The men off the derrick?

A. Yes.

Q. And do you know the capacity of your boat in tons?

A. No, I don't know that.

Q. And who told you you were going to be towed that afternoon?

A. The engineer tells me, he said it was no use, for you are ready to go.

Q. That is the derrick engineer?

A. It was supposed to be.

Q. Why did he say that?

A. Because he didn't want to straighten it.

Q. Did he tell you that when you asked him to straighten your load?

A. Yes.

Redirect examination.

By Mr. Eggleston:

Q. You said you had your boat loaded even with the deck, what kind of cargo was that?

A. Sand.

Q. Did you ever have your boat loaded even with the deck with other cargo?

A. Sand all the time besides brick.

Q. Did you have your scow loaded even with the deck with brick?

A. Yes.

Q. And when was that, before you went up to take the load of ore?

A. That was before I took the load of ore.

[fol. 99] Q. How long before, that you had her loaded with brick so she was down even with the deck?

A. I had this load on at the Erie Basin for four weeks, something like that.

Q. When did you discharge that load, with reference to the time that you went up to get the ore, how many days?

A. Well, I guess it was about three days, two or three days.

By Mr. Martin:

Q. I thought you told us on direct examination that with brick cargoes you were generally loaded with 3½ free board?

A. Yes.

Q. With the brick?

A. Yes.

The Court: Which did you do?

The Witness: I was loaded very deep with brick and laid for some time.

The Court: How near was your deck to the water?

The Witness: Many a time I can't tell you; sometimes it was 2 feet and sometimes 2½ feet.

The Court: From the deck or the rail?

The Witness: From the deck.

The Court: That would make more; if it was the rail it would be 3 feet more.

Q. They carry sand on these boats, too?

A. Yes.

Q. And with brick they have 2 or 2½ feet?

A. Yes.

Q. You never get less freeboard than 3½ with brick, do you?

A. How do you know?

The Court: He asked you that——

[fol. 100] A. I said I did.

By Mr. Eggleston:

Q. When they load brick on you sometimes they put on more of a load than at other times?

A. Yes.

The Court: Of course they do.

Q. Captain, you said they loaded this ore onto your boat with a bucket?

A. With a bucket, yes.

Q. After they dropped it off of the bucket what did they do?

A. They didn't do anything.

ALFONSE AVUSSO, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Who do you work for?

A. I work for Cullen.

Q. And what is your job with Cullen?

A. Anything for a boat.

Q. Are you a scow captain?

A. A deck scow.

Q. How long have you been captain of deck scows for Cullen?

A. For Cullen, fifteen years.

Q. And how long have you been captain of deck scows?

A. I am in the scow fifteen years for Cullen, twelve years for O'Brien & Fleming, five years for Cleary Brothers, three years for New York Trap Rock—all the time on deck scows.

Q. What scow are you on now?

A. 36.

Q. What scow were you captain of in August, 1925?

A. In 1925? Well, you mean on my boat?

Q. What boat were you captain of?

A. Cullen 36.

[fol. 101] Q. Do you remember the day that the Cullen No. 32 dumped a load of ore?

A. I don't remember—I know I was there.

Q. Did you see the acident?

A. Sure; I was there.

Q. Do you remember that?

A. Sure; I had a load myself of copper ore.

Q. Were you on the No. 36 when the No. 32 spilled her load?

A. Yes, on the 36.

Q. Where was the 36?

A. On the bow of the ship; the 32 was under my stern at the bow end.

Q. How long had your boat been alongside the bow of the ship?

A. Well, I can't remember; I don't keep no track; when I got a load they take me out.

The Court: Did you have a derrick there?

The Witness: Yes, sure, No. 2—digger No. 2.

Q. Did you take a load of ore onto your boat?

A. Yes, I had a load before 32.

Q. You loaded before the 32?

A. Sure.

The Court: Is your boat the same size as the 32?

The Witness: Yes, my boat is 114 feet long and 34 feet wide.

The Court: Just about the same size?

The Witness: Yes, 8 feet 6, and I have been on that boat—it is for sand or anything.

Q. From what part of the ship did you take your cargo, from the bow or the stern or amidships?

A. At the bow hatch No. 3.

[fol. 102] Q. Were you there when the Cullen 32 came in?

A. Yes.

Q. Did you see her loading?

A. Yes.

Q. What part of the ship was she loaded from, the No. 32?

A. What part of the ship she loaded—on the port side—I no talk good because I no go to school here—it is the port side.

The Court: The steamship was lying alongside of the dock?

The Witness: Yes.

The Court: And you were up near the bow of the steamship?

The Witness: Yes, sir.

The Court: She had two hatches?
The Witness: Yes, sir.
The Court: Where was the Cullen that turned over, the 32?
The Witness: She was on my stern.

Q. She was taking it from one of the stern hatches?
A. From one of the stern hatches, the 32.

The Court: There was a ship here and there is a hatch here and you laid at the after hatch?
The Witness: Yes.

Q. And there was a derrick between the Cullen No. 32 and the ship, is that right?
A. Yes.

The Court: There were two derricks there, were there?
The Witness: I don't know, I see one derrick.

[fol. 103] The Court: Was there one between the Cullen No. 32 and the ship, too?
The Witness: There was a derrick between the Cullen 32 and the ship and a derrick alongside the ship, and then the 32.
The Court: And that was the same arrangement you had with another derrick?
The Witness: Yes, sir.

Q. You saw the 32 go over, didn't you?
A. Yes.
Q. What time did the 32 start loading?
A. Well, when I see it they were working I see the boat give a list, they took the cargo all on one side.
Q. And which side was that?
A. The port side.
Q. Away from the ship or toward the ship?
A. They took it from the ship and put it on the scow.

The Court: The side of the scow that was toward the derrick or away from the derrick?
The Witness: One of the dippers took it and put it on the ship.
The Court: Here is the ship, the berth; you have your front hatch there and the after hatch there. There is the

derrick, we will say, that is lying here and a derrick lying like this along here; see?

The Witness: Yes.

The Court: And then there is your scow, the 36, which is lying like that and the 32 is lying like that, is that about right?

The Witness: That's right; that is my boat.

Q. And this is the bow of the ship?

A. I know that's the bow.

[fol. 104] The Court: Now the question asked you was, when they loaded the cargo on No. 32 did they load it on that side of the 32 or on that side of the 32?

The Witness: That is the 32. When they put it on the scow they put it all on this side (indicating the outboard side) and it slide all over on the rail.

Q. Did you see them dumping that on the 32?

A. Sure.

Q. After they dumped it onto the 32 and it fell out of the bucket what did they do on the 32? After they dropped it out of the bucket?

A. I see it giving a list.

Q. After they dropped the ore out of the bucket onto the deck of the scow what did they do with that stuff?

A. They put it on one pile.

The Court: Was there anybody there that was trimming it?

The Witness: No, nobody trimmed it.

Q. About what time of day was it that the boat turned over?

A. I don't remember for it wasn't so heavy—I don't keep no clock on my boat.

The Court: Did you see her turn over yourself, with your eyes?

The Witness: Yes.

Q. Before the boat turned over what did you do?

A. I stood on the side and see the scow giving a list and I said, "Cap," and he come out——

Q. Whom did you holler to?

A. To the captain of the 32 for he was inside. I said, "Come out and look; your boat is giving a big list." I [fol. 105] don't know what he said to the engineer.

Q. Did you see him talking to anybody on the derrick?

A. Yes, I seen him talking.

Q. When you hollered to the captain of the 32 did he come out?

A. Sure he come out.

Q. What happened?

A. He come out for I told him it was giving a list all the time but I don't know what he told the engineer of the derrick.

Q. Why did you holler to the captain of the 32?

A. I hollered to him.

Q. Why did you do that; what was happening?

A. I hollered to him for the scow give so much of a list.

Q. How about the cargo on him when you hollered to the captain?

A. It was sliding to one side.

Q. It was sliding when you hollered to the captain of the 32?

A. When I hollered to him he was inside the cabin.

Q. Which way was the cargo sliding when you hollered?

A. On the stern.

Q. Was it sliding to the derrick or away from the derrick?

A. On this side of the dock.

By the Court:

Q. Away from the derrick or toward the derrick?

A. Away from the derrick.

Q. Supposing that was the 32; was it sloping like that or sloping like this; show us?

A. When she dumped the load, that is the scow, it went over on this side, it was heavy and it took a list.

Q. How did she list, straight over that way or like this (indicating)?

A. She was list very much; I called the captain for I didn't want to see him drown.

[fol. 106] Q. Did you think it would turn over suddenly?

A. Sure; they come upside down at the Long Island Railroad dock.

Q. I mean, were you afraid before you saw that happen, that it would turn over quickly?

A. Oh, it go over easy, the captain jumped on my boat.

By Mr. Eggleston:

Q. You said when you hollered the cargo was sliding?

A. Yes.

Q. What made it slide?

A. Every little boat that passed by in the river makes a swell, you know.

The Court: And the swells hit the scow and she was tender—we have a phrase "tender"——

The Witness: One time I got my wife on the boat and she shrieked and he makes a funny noise——

Q. What was it that made this cargo slide when you hollered to him?

A. The swell made it.

The Court: You mean the scow 32 bumped against the lighter?

The Witness: Against the derrick.

The Court: And as it bumped this stuff which was on her, which was easily moved stuff and was heavy, was sliding off, it rolled off?

The Witness: It was a bigger boat, your honor. I got three or four loads more—the boat *when* down quick, it was heavy stuff.

[fol. 107] Q. Did any of the cargo go over the side?

A. Sure.

Q. Which side?

A. On the port side, I don't know what you call it.

Q. The outside?

A. The outside, yes.

Q. What did the captain of the No. 32 do when he came out when you hollered at him, if you saw him?

A. When he came out of the cabin he cut the bow line; I don't know who cut the stern line for I never seen it.

The Court: He cut the bow line as soon as he came out?

The Witness: Sure.

The Court: Did he go ashore?

The Witness: No, he jumped on my boat.

The Court: How far was he from your boat?

The Witness: He was here (indicating).
The Court: How far is your boat from here?
The Witness: That is my boat and that is his boat.
The Court: How far apart were they?
The Witness: Just like that.
The Court: How many feet?
The Witness: Oh, about two feet he jumped.
The Court: He jumped——
The Witness: He jumped on my boat.
The Court: After he cut the line?
The Witness: After he cut the line.
The Court: You didn't see him go ashore?
The Witness: No, no, no——

Q. Now, after the captain first came out of his boat, right after you hollered at him and he came right out, did he go [fol. 108] over on to the derrick then?
A. When he jumped the load——
Q. No, before that?
A. He was on the boat.
Q. And you hollered at him and he came up on deck?
A. Yes.

The Court: Tell us this; what he did when you hollered to him; he had bene painting his cabin and he came out?
The Witness: Yes.
The Court: Tell us slowly what happened?
The Witness: When I hollered I said, "Cap, you look out for your boat for she is listing and you might be dumping your load."
The Court: And what did he do?
The Witness: He come out and spoke to somebody.
The Court: On the derrick?
The Witness: I don't know for it wasn't my business for when I have a load I get out of there.

Q. Did the captain of the 32 go on the derrick?

Objected to.

The Court. What happened after that?
The Witness: He wanted him to trim the——
Mr. Martin: I move to strike it out. He said before he didn't hear any conversation between them.
The Court: Did you hear what the captain of the lighter said to the man on the derrick?

[fol. 109] The Witness: Oh, no, it was too far.

The Court: What did he do after he spoke to the man on the derrick?

The Witness: What did I do?

The Court: No, what did he do?

The Witness: I don't know for I was in my cabin; I was outside smoking my pipe, that is all, and he spoke to the man on the derrick.

The Court: Did you see him go ashore?

The Witness: No, the captain never came ashore; he stayed aboard.

The Court: How long after that did he cut the line of the light?

The Witness: He cut it before the boat started to go over.

The Court: How much time was there between the time you called him and the time he cut the rope?

The Witness: About twenty minutes. It takes quite a time for the boat to go down.

The Court: You say you thought it was fifteen or twenty minutes, something like that?

The Witness: Yes.

The Court: Your boat wasn't fastened to him?

The Witness: No, I have a line on the steamer and a line on the dock, on shore.

Cross-examined by Mr. Martin:

Q. Your boat was loaded all right?

A. Why, sure it was all right.

Q. You had no trouble up there?

A. No.

[fol. 110] Q. Your boat took her load on all right?

A. Yes.

Q. Let us take it easy, Captain, and I think we will get along. Yours is a deck scow?

A. Yes.

Q. And how high was it piled on your deck scow?

A. 10 or 9 feet high.

Q. And you had no difficulty with your loading; you were loading all right?

A. Yes, I was loading all right.

Q. Did the same people load you?

A. Sure, the same people.

Q. And you had the same kind of material?
A. Yes, sir.
Q. Copper ore?
A. Yes, copper ore.
Q. Were you loaded before the 32 was loaded?
A. Yes, sir.
Q. And were you loaded at the same place where the 32 was loaded?
A. Yes, sir, the same street.
Q. Were you loaded at the same hatch?
A. I was at hatch No. 3.
Q. Where you were loaded did you see the 32 in at the same place?
A. 32 never stayed at all; he stayed alongside of the ship, on the stern.
Q. Do you know the day you went up there?
A. Do I know?
Q. Do you know the date you went up there with your boat?
A. Oh, no.

By the Court?

Q. How many days had you been there loading?
A. I think two days, for we take the two boats in together, me and the 32.
Q. Do you mean you were brought down by the tugboat when the 32 was brought down?
A. Yes, they are towed together.
[fol. 111] Q. Were you down there when he was brought in?
A. Who, the tugboat?
Q. No; were you down there when the No. 32 was brought there?
A. Yes, sure I was there.
Q. You were ahead of him?
A. Yes.

By Mr. Martin:

Q. You weren't towed down by the same tug as the 32?
A. Yes.
Q. Were you in the same tow as the 32 coming down?
A. No, he come after me.

Q. Now, the usual way to load is that they put a bucketful in the center of the boat at one end?

A. Yes.

Q. And then go across from side to side, is that right?

A. Yes.

Q. And then they leave a little space and go a little further up the center and put a bucketful there, is that the usual way?

A. Now, listen—when the digger comes up he comes over and puts it on the deck, he don't care where he puts it.

Q. He puts it any old place——

A. For I was on my boat and I have to look out for my self——

(The witness shouts and is told by the Court that he must not shout.)

Adjourned until 10.30 A. M. November 14, 1930.

[fol. 112] 12.45 p. m. Nov. 14, 1930.

Trial resumed, present as before.

Mr. Middleton: May I ask the witness Santos one question I omitted yesterday, your Honor?

The Court: Yes.

Mr. Eggleston: I move to amend the libel to include the loss of effects of the captain of the scow and increase the amount of the libel by $250.

There is no objection.

EMANUEL SANTOS, recalled, testifies:

By Mr. Middleton:

Q. Santos, when your scow turned over, did all the cargo spill out in the river?

A. When she turned over the cargo all went.

Q. It all went in the river?

A. Yes, sir.

By Mr. Martin:

Q. I understood you to say you were captain of this boat for three years prior to this accident?

A. I was there for four years.

Q. On this boat?
A. On this boat I was a year.
Q. And were you on her constantly?
A. Yes, sir.
Q. Did you ever go to drydock with her in that year?
A. I don't remember.
Q. You don't remember going to drydock with her, do you?
A. No.
[fol. 113] Were you working for Cullen?
A. Yes, sir.
Q. For four years before?
A. Yes, sir.
Q. Did you know this boat?
A. Yes, sir.
Q. Very well?
A. Yes, sir.
Q. Do you remember her sinking in 1923, two years before that?
A. I wasn't there.
Q. You were with Cullen?
A. I was with Cullen but not on that boat.
Q. Do you remember here sinking in 1923?
A. I heard about it.
Q. She sank up at 29th Street with a cargo of coal on her?

Mr. Eggleston: I object.

A. I don't know; I heard she sunk but I don't know what she had on.

Mr. Eggleston: It has no relation to this case, your Honor.

The Court: It isn't much proof but it is a suggestion.

Q. Do you know who was the captain of this boat in 1923?
A. I don't know; I don't remember.

RUDOLPH H. SAMBRAUS, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Mr. Sambraus, what is your occupation?

A. Executive with the Cullen Fuel and the Cullen Transportation Company.

[fol. 114] Q. What office do you hold?

A. Vice president.

Q. Both companies?

A. I do.

Q. And how long have you been connected with those companies?

A. I have been connected with the Cullen since 1915.

Q. It has been testified that the deck scow Cullen No. 32 sank with a cargo of coal at 29th Street in 1923. Did the Cullen No. 32 sink with a cargo of coal at 29th Street at that time?

A. She did not.

Cross-examined by Mr. Martin:

Q. Did she sink in 1923?

Mr. Eggleston: If the Court please, I object to any examination of this witness unless it is strictly cross examination on what was brought out on direct unless Mr. Martin makes him his own witness.

The Court: All I want is to get at the truth.

Q. Did she sink in 1923?

A. She did.

Q. Where?

A. In Long Island Sound.

Q. What was on her at the time?

A. Sand and stone, gravel.

Q. You are the man who has charge of these boats for Cullen?

A. Well, if you want to call it such, yes; one of them.

Q. You keep records of these different boats?

A. We do.

Q. Keep repair bills?

A. We do.

Q. Have you the repair bill for the repair due to the sinking in 1923?

A. We have not.

[fol. 115] Have you any records to show when this vessel was in drydock prior to August of 1925?

A. We have not.

Q. You knew there was a suit pending here in quite a considerable sum?

A. I did.

Q. And you have not the records?

A. Not the particular records you are asking me for.

Q. I am asking for records of any shipyard?

A. No, we have not any records of any sort.

The Court: Does that refer to all the scows?

The Witness: Yes.

Q. How long do you keep your records?

A. As a rule we keep them five or six years.

By the Court:

Q. And the practice is the same now?

A. Your Honor, we had considerable trouble, we knew on two different occasions, certain of our records were stolen in 1927.

Q. It is a curious kind of a thing to steal.

A. They were taken with some other records at the time.

Q. What do you mean?

A. Some financial records were taken at the same time and we have been unable to locate these records; we have been looking for them perhaps a month or so now.

Q. Aren't there any records of 1927?

A. Yes, we have——

Q. What is the date of this?

A. This is 1925.

[fol. 116] By Mr. Martin:

Q. Then all your records prior to 1927, repair bills and surveys, have been stolen?

A. No, sir, not all.

Q. Have you any?

A. Yes, sir.

Q. Have you any of this date?

A. I have been trying to find the records for 1923, 1924 and 1925 for this boat, with a number of others, and we cannot find them.

Q. Were your ledgers stolen?

A. No, these were sheets and folders.

Q. Were your ledgers stolen?

A. Not ledgers, no.

Q. Journals?

A. No.

Q. Daybooks?

A. No.

Q. You have them?

A. No. These sheets were stolen.

Q. I am not asking you that?

A. We don't keep the records of the boats in the day books.

Q. But you keep the records of the money you pay out in the daybook and journal, don't you?

A. Oh, surely.

Q. Have you got them with you?

A. No, I have not.

Q. Your ledger and journal would show what you paid on these boats in 1923, 1924 and 1925, wouldn't they?

A. They wouldn't identify the particular vessel; we would give a monthly sum that we paid the drydocks.

Q. Do you mean to say your books wouldn't show the specific payments on a particular boat?

A. No.

Q. You have no entries specified in your ledger or journal to show that?

A. No.

[fol. 117] Q. What records have you?

A. In the records with the bills attached.

Q. Where do you transfer them from, these records or sheets, to what books?

A. We have a voucher system.

Q. I understand that——

A. Well, that is my answer to it.

Q. Is that your best answer?

A. That is my best answer.

Q. Now, do you transfer your vouchers when you make payments to your ledger or journal or any other book?

A. The amount, yes.

Q. And the name of the boat?

A. No, we do not.

Q. Then you don't know the amount that you pay out on a particular boat. Do you know from your ledger or journal the specific amount you paid out on a particular boat in 1923, 1924 or 1925?

A. No, I do not.

The Court: He says he doesn't. He says he would look up the vouchers and trace them back.

Q. Do your books for 1927 specify the boat and the particular repairs on her?

A. No.

Q. Where are those books?

A. Naturally at our office.

Q. Where is your office?

A. 192 Lexington Avenue.

By the Court:

Q. Where did this vessel sink in the Sound?

A. She came down in a tow with a number of other vessels that were sunk by the storm.

[fol. 118] Q. Where was she sunk?

A. Some place around Execution Light.

Q. Did she just go ashore?

A. If I recall correctly there were two or three scows at the same time in charge of a Moran tug.

Q. Do you mean sunk in a storm?

A. Yes sir.

Q. When you say sunk do you mean they were driven into shallow water and lay there?

A. Some were driven into shallow water; I don't just recall; my recollection is that the Cullen 32; she was damaged and she was sunk with a cargo and if I recall, she was originally brought into the College Point drydock, if I recall; I am not positive of that because it is five years ago.

Q. It was salved——

A. I remember her sinking at that time.

Q. She was salved and repaired?

A. Yes, sir.

Q. Is there any way of telling just what was done for her when she was taken out or do your record prevent your telling that. You ought to have a record of this vessel from that time on?

A. If I may explain the situation——

Q. Go on.

A. We did building work in 1923, 1924, 1925 and 1926. In 1926 our property was taken over by the City and we moved from down town, we moved up to 30th Street and from 30th Street we moved up to Lexington Avenue. Now, in addition to the records of the ships we have some records of ships and I would be glad to bring them down and show the Court—some of the records in our storeroom were disposed of, I don't want to say they were stolen but they were lost at the time by the person who was supposed to look after that particular work.

Q. You say the City took over your property?

A. Yes, we had some land at 30th Street and we were [fol. 119] required to move again, and our records I don't want to say to the Court that they were stolen on account of the reputation of the person who was supposed to take care of them, but they were lost with other records. There were three or four files completely gone. And in checking back for three or four months, I have had someone doing nothing else, there were some particular sheets for 1925 he was not able to locate. We have some sheets for 1924 that we found and some as far back as 1923. Those are daily loose leaf sheets that we keep in a big book.

The Court: We will have to deal with just memory, then, instead of the documents, I suppose.

By Mr. Martin:

Q. You say your recollection is that this boat was in tow of a Morgan tug when she sank?

A. I believe that was the case, yes.

Q. Didn't she sink lying at a pier?

A. No, I don't recall that she did.

Q. Well, will you say she didn't, you have given the impression she was in a tow at the time she sank?

A. That is my recollection, yes.

Q. But you won't say she didn't sink at a pier?

A. I will positively swear that she didn't sink at 20th or 30th Street.

Q. Was she ever repaired, or do you know?

A. Most assuredly she was.

Q. Do you know where?

A. No, I do not; I can't. I haven't been able to check that at all.

[fol. 120] By the Court:

Q. Who in your organization would know most about the history of this boat?

A. I would know as much as anybody; my recollection is that she was repaired by the Jersey City Drydock, but I am not definite about that; I am trying to check up these things; we have total sums of money in ledgers; we don't carry and itemize each particular bill in the ledgers.

Q. Don't you suppose that it may be true that you were operating a different way, might it be true that the system in the Jersey City and other drydocks would deal with each individually and you could go to them and find out about it?

A. Yes, I could do that and get the information.

By Mr. Martin:

Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in the drydock?

A. No.

Q. Made no endeavor at all?

A. No, I haven't, for I have been unable to find out from our own records.

The Court: He says he has been working on his own records very hard; and it apparently never occurred to him to go across the river and try to get those from the drydocks.

Q. Then you have nothing at all to fix when this boat was last in drydock previous to the sinking?

A. No, I have not.

Q. Was the boat repaired after the sinking that is involved in this action?

A. No, she was not; she was a total loss.

[fol. 121] Q. What did you do with her?
A. Used her as a little boat for repairs.
Q. As a float for repairs?
A. Yes.
Q. You were with Cullen since 1915?
A. Yes.
Q. You were with him before that, wasn't you, too?
A. Not in an official capacity until 1915.
Q. You became an official of the company then?
A. Yes.
Q. How long were you with him prior to 1915?
A. Well, off and on, I guess for three years.
Q. That would be 1912?
A. About that, I think.
Q. Is that when you think you first went to Cullen?
A. I think it is, yes—I wasn't continuously with Cullen at that time, until 1915 and in an official capacity.
Q. Have you any record showing where the 32 was built?
A. No, I have not.
Q. Do you know where she was built?
A. Some place up the Hudson River.
Q. Is that a guess, or do you know?
A. I know that to be a fact; somewhere up the river.
Q. Have you anything to show the date when she was built?
A. No, I have not.
Q. Is she recorded anywhere?
A. Not to my knowledge.
Q. She was a pretty old boat, wasn't she?
A. I don't know what you mean by an old boat.

The Court: Approximately how old was she; have you any idea?

The Witness: In 1915—1925, she was probably fifteen years.

Q. Wasn't she nearer twenty-five years old in 1925?
A. No, she was not, positively.
[fol. 122] Q. You have no doubt about that?
A. I am positive of that.
Q. Did you ever see her bill of sale to Cullen?
A. No, I never saw that.
Q. Was she built for Cullen?
A. I believe she was built either for Mr. Cullen or Mr.

Cullen's father; I don't recall.

Q. How long is Mr. Cullen's father out of business?

A. Well, he died in either 1916 or 1917.

Redirect examination.

By Mr. Eggleston:

Q. Mr. Sambraus, how much of a staff does Cullen maintain to repair his own boats?

A. Oh, probably four, six, eight men at times.

Q. And do your ledgers or daybooks or journals show the amount of time or the amount of work that your own men put on any one boat?

A. No, they do not; we have that on the payroll; that is all.

Q. After the accident to the Cullen No. 32 in the Sound that you have referred to, in 1923, what was done with the boat?

A. In what respect; do you mean about repairs?

Q. Yes.

A. Oh, she was repaired; there is no doubt about that.

Q. And after she was repaired what was done with her?

A. Put back into service; we used the boats all winter for coal.

Q. And was she continued in service after that?

A. Oh, surely; that is, it is the sinking of 1923 you are referring to now?

Q. Yes.

A. Correct.

[fol. 123] Recross-examination.

By Mr. Middleton:

Q. In your capacity as vice-president of the Cullen Company do you keep an eye on your various boats with reference to their seaworthy condition or do you leave that solely to Mr. Sweet?

A. Well, up until 1929 I was very much interested because I was right at the work all the time at 29th and 30th Street and there wasn't a day that went by that I didn't see a considerable number of boats in the slip down there.

Q. Did you conceive it to be part of your duties in 1925 to inspect the boats for seaworthiness?

A. Yes.
Q. Did you inspect the 32?
A. No.
Q. You left that for Mr. Sweet?
A. Yes, sir.

By the Court:

Q. What is he called?
A. He is in charge of the captains and marine office.
Q. You call him the head of your marine department?
A. Yes.

By Mr. Shortridge:

Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repairs of your boats?
A. Well, sort of superintending the men, for he was continually there.
Q. Who was his immediate superior in that work?
A. Myself, personally.
Q. And you were an officer of the company at that time, were you not?
A. Yes, sir.
Q. Mr. Sweet was not an officer of the company?
A. No, he wasn't.
[fol. 124] Q. And you say you didn't personally inspect this Cullen 32 at that time?
A. I don't remember.
Q. But you did inspect her?
A. Yes, sir.
Q. When?
A. I couldn't give the dates.
Q. Could you give me the month?
A. No, I don't think I could.
Q. Can you give me the year?
A. Well, as I said before, up to 1929, I made it my business every once in a while to go down and check up.
Q. I don't know what you mean by your business, but I want to know when, before this accident in 1925, was the last time you inspected this boat?
A. I can't say.
Q. You wouldn't be able to say that you inspected her within a year?
A. Oh, that would be positive.

The Court: Had you gone in it down below?
The Witness: Oh, yes.

Q. How far do you go; do you go with a flashlight?
A. No, we go right through the scow.
Q. What do you do when you go down?
A. You go down with a flashlight and walk through and look at the beams and go down the other end.
Q. And is that the extent of your inspection?
A. Look at all the beams.
Q. That is all you do?
A. Yes.
Q. That according to Mr. Sweet takes three-quarters of an hour?
A. About that.

The Court: What else could you do?
The Witness: There isn't anything else you could do.

[fol. 125] Q. This inspection, of course, is made when the boat is light and drawing about 2 feet, isn't it?
A. Yes.
Q. You don't know when you made such an inspection last before the boat sank in August, 1925?
A. I don't know the exact time, no, not on this particular boat.
Q. And the duty for such an inspection, you say was entirely passed over to Mr. Sweet as far as this boat is concerned, is that right?
A. Yes.

The Court: All the boats, he said.

Q. But you relied entirely on Mr. Sweet's inspection to determine the condition of this boat, is that right?
A. No, I don't think I want to put it that way; I don't rely on any one particular man at all.
Q. Well, so far as the condition of this boat immediately before she went on charter on August 11, 1924, is concerned, you did rely on Mr. Sweet?
A. Not particularly.
Q. Who else did you rely on?
A. There was his brother there and a foreman caulker.
Q. I thought you told me a moment ago that Mr. Sweet had this duty?

A. It was his duty but everyone needs a little checking up once in a while.

Q. What checking up did you do?

A. I get a little information from the other men once in a while and I check up on that.

Q. When did you do that?

A. I don't know any particular day; I am doing it every day in the week.

By the Court:

Q. For instance, to see that Mr. Sweet was doing his duty?

A. Right.

[fol. 126] Q. And you asked somebody about that, about Mr. Sweet and when he went on such and such a boat?

A. Yes, and particularly I recall at that time, here was a case where we had a scow in some work where they have taken some pipes and they have broken them and broken some deck beams and a report came from one of the men about broken deck beams and I particularly requested Mr. Sweet at the time for I wanted particularly to see at the time if there was any broken deck beams and I particularly recall that he was at that time there and he has ever since gone through the boats, and to see if there are any broken deck beams you have to go in that boat to find it out.

Q. Broken deck beams is one thing, but you can't discover leaks above the water line when she is light, you have to guess at it?

A. No, you can't; you do have to guess at it. You may find a little sweat inside but if there is a leak at the time the men usually tell you about it soon enough; you know it.

By Mr. Shortridge:

Q. Then this all falls upon Mr. Sweet except that you relied in the question of leaks on the master of the barge?

A. No, we do not; not if the barges come up to our plant where we have the opportunity of giving them a thorough inspection.

Q. Well, unless something has happened to her on a previous charter, if she comes off a charter one day and goes on another a day or two later you don't search the entire length of every seam on that boat, do you?

A. No, we do not.

Q. You depend on the barge captain to tell you whether she leaked on the last charter?

A. Right.

[fol. 127] Q. And so far as leaks are concerned you are relying always on the barge captain to tell you whether she has leaked previously?

A. Yes, unless the vessel comes to our yard.

The Court: If the vessel comes up to 29th Street?

The Witness: Right.

The Court: And you know this vessel was up there just before she was on this charter?

The Witness: Yes.

By Mr. Martin:

Q. Does Mr. Sweet make reports in writing?

A. No, he does not.

Q. Did he at that time?

A. No, he did not.

Q. Everything he does is verbal?

A. Well, I don't quite understand the question, when you say everything he does.

Q. I mean in respect of boats—all reports in regard to inspecting boats are verbal reports, talk to you?

A. No; in case there is anything wrong with the boat it is repaired.

The Court: He writes you a letter?

The Witness: No.

Q. And they would have been lost, too?

A. I don't say they would have been lost.

Q. You say the boat was carrying coal in the winter of 1923?

A. No doubt she was.

Q. And 1924?

A. No doubt she was.

Q. That is a deck scow, isn't it?

A. Cargo.

Q. Is that her principal trade?

A. That is not her principal trade; that is a trade that [fol. 128] takes the place of it when the slack time comes for the deck scows.

Q. How was the trade in 1923, 1924 and 1925; was it pretty slack?

The Court: He means that the winter trade is coal.

Q. Whom did you ever carry coal for?

A. Goodwin-Gallagher.

Q. When?

A. In 1922.

Q. In 1923 or 1924?

A. I don't just know.

Q. Or 1925?

A. I am not in a position to state the dates or anything like that.

Q. Will you say this boat carried sand or gravel for the Seaboard Sand & Gravel Company or Goodwin-Gallagher in 1923, 1924 or 1925?

A. In 1923 I will, yes.

Q. I mean subsequent to the sinking of 1923 and subsequent to the sinking of 1925?

A. I will, in 1923.

Q. Prior to the sinking or after?

A. Prior to the sinking in 1923 she was working for the Goodwin Sand & Gravel.

By the Court:

Q. She couldn't have sunk in very deep water?

A. She would throw her deck load off and sink decks to; they don't usually go down unless they throw the cargo; a scow will usually throw the cargo off the deck; it is very seldom they sink with all the cargo on.

Q. What are the causes which make her sink?

A. There are many causes, the way the cargo is put on them.

[fol. 129] Q. I shouldn't think you would get play there with the cargo on long?

A. There are other reasons.

Q. What are they?

A. Well, they fill up with water when she has a cargo on.

Q. Or have a little leak and fill up by degrees?

A. Well, in a case of that kind I have never been on a scow yet that sunk, personally, so I really don't know the actions any more than I have heard and I have heard so many different stories of what can happen——

Q. What about these wooden longitudinal divisions of a scow like the 32, they aren't watertight?

A. No, they aren't.

Q. And if there was much water in them they might prevent the sudden rushing of water from one side to the other; aren't they solid?

A. No, they have scuppers cut in.

Q. They are just for the construction?

A. They are just for the construction; the longitudinal bulkheads really only run from the sills up, that is, the longitudinal sills, that they have in there. We have a model here that I brought down, your Honor.

Q. Does that show pretty nearly?

A. There is something they have in there in case a vessel—I think there is a longitudinal bulkhead in there, too.

By Mr. Eggleston:

Q. Mr. Sambraus, how long has Mr. Sweet worked in the marine department for the Cullen Company?

A. Well, he has been connected with us since 1917, I believe.

Q. And how long had his work been connected with the building of boats for the Cullen Company?

[fol. 130] A. Well, about 1920; I don't recall the time.

Q. And have you had occasion to observe what kind of work he did?

A. Oh, yes.

Q. How is his work?

A. Well, he wouldn't be with me today if he wasn't all right.

Q. You said you used to inspect boats yourself; did you use to inspect the entire fleet?

A. Oh, yes, at one time I did.

Q. That was prior to 1929?

A. That was prior to 1929.

Q. How long would it take you to go around the fleet inspecting the boats—how often would you make the rounds of the fleet?

A. How large a fleet?

Q. The fleet of boats that you had in 1925; how long would it take you to go around all the boats of the fleet?

A. It would depend on where they were located, but we

have twelve or fifteen boats of our own all the time at 29th or 30th Streets.

Q. How long would it take you to go around and inspect all the boats of that fleet?

A. It takes three-quarters of an hour to go through a boat.

Q. You said you didn't know the exact date you inspected the 32 in 1925. Now, can you tell us how long it would take you to make a complete inspection in 1925 of all the boats you had—how often would you make the rounds?

A. Oh, you might look at a boat every week or once every two weeks, or I might not see them in a month.

Q. What would you say was the longest time that you had seen No. 32 prior to the time she went under charter; what would be the longest time since you had seen her?

A. Oh, I don't think it would be more than—I can't recall, I don't know exactly the time, I didn't keep a record [fol. 131] of every time I went down in them but I may have gone down in one boat twice a month and maybe not even see her again for two months.

Q. Well, what would be the longest——

A. Perhaps six months.

Q. And what was the condition you found the 32 in when you last saw her?

Mr. Martin: That is immaterial unless we have something definite.

The Court: When did you last see her and inspect her yourself?

The Witness: I don't know, your Honor, whether it was a month or——

The Court: Well, you examine him.

The Witness: Within six months prior to her last sinking.

The Court: And you actually went on her and went through her the way Sweet described?

The Witness: Yes.

The Court: And what was her condition then?

The Witness: Very good.

The Court: And you think that would be in the early part of the winter 1924-1925?

The Witness: Yes, it may have been after that; may have been only a month.

Q. When you made the inspection you say you examined the interior; did you examine the outside?

A. As much as you can see.

Q. The planking on the outside or the caulking?

A. Yes; if there was a boat alongside, that is the time you get a good opportunity to look at them.

[fol. 132] Q. Did you do that with the 32?

A. I don't recall that.

By Mr. Martin:

Q. The inspection consisted of walking through the boat as you told us and standing on the boat or the dock and looking at the boat?

A. Well, probably on a boat alongside.

Q. Well, standing on something, a loaded boat or the dock or something else and looking at her?

A. Yes.

(Adjourned until 2:30 P. M.)

Met pursuant to adjournment at 2:30 P. M.

Present: As before.

FRANK GARDNER, being duly sworn and examined as a witness for the petitioner, testifies:

Direct examination.

By Mr. Eggleston:

Q. Captain, what is your occupation?

A. Marine surveyor and appraiser of ship's property.

Q. Now, will you tell us briefly what experience you have had as a surveyor?

Mr. Martin: We will waive it.

Q. I would like to have a little of it on the record.

A. I first had to do with ships as a boy in the yards in Nova Scotia; after being in the yards a number of years I went to sea as master of ships, British license since 1890, [fol. 133] and I had to do with American ships, got an

American license in 1900 and from then on I was continually repairing and supervising in both sail and steam and inland trade.

The Court: All inland trade?

The Witness: No, both; my certificate called for any ship on any ocean.

The Court: I mean repairing?

The Witness: Yes.

Q. What experience have you had in the surveying and repairing of barges and deck scows?

A. Well, I have been working both for the underwriters and the owners making repairs.

Q. For how long?

A. Fifteen, seventeen years.

Mr. Eggleston: If the Court please, I have a model here of a deck scow; it isn't a model of the Cullen No. 32. I think Captain Gardner can answer any question your Honor is interested in in deck scows in general.

The Court: You didn't have as many fore and aft strengtheners in that vessel?

Mr. Martin: The other one was differently built, the other was a bulkhead boat.

By the Court:

Q. This is a stronger construction than the other one? This has been described to me as having three fore and after bulkheads which were not watertight, which were called bulkheads and which divided the lengthwise dimen- [fol. 134] sions of the scow into substantially three equal parts?

A. That's right.

Q. The 32 I am talking about?

A. Yes.

Q. Now, the illustrative model (which has been placed on the bench) is not the same as that and is much more strongly constructed, I should suppose?

A. I beg your pardon, your Honor; it is not as strong. These are X braces. Take this X-brace here, but the least little twist you will twist them, but the fore and aft you don't twist them. If you take a cargo on her you will twist her quicker than the one with the bulkhead, and the one with the bulkhead also has braces in her.

Q. It has also some athwartships in connection with the sides and these bulkheads?

A. In the shape of knees; you see these knees here——

Q. And you think that the lengthwise construction is stronger?

A. Yes.

Q. Which is the most modern?

A. Some are building this way because it is cheaper, but it is not as strong as are bulkheads. They give more longitudinal strength and there is less twist in it.

Q. As far as the deck is concerned, is this substantially the same as the 32?

A. The same thing.

Q. This side and the bitts and the hatches forward and the house?

A. Approximately the same. These decks go crosswise and the bottom planks go crosswise.

Q. So you think—I can see that the lengthwise bulkheads——

A. It is edge-bolted, too.

Q. —would make a stronger construction than athwartship because it wouldn't allow so much twist, is that the idea?

A. Yes.

Q. And it would have just the same beams along the deck——

A. Everything the same.

[fol. 135] Q. Everything the same except this strengthening would prevent—well, you say prevent dislocation or twist?

A. Yes.

Q. And when twisting would bring them back quicker?

A. Yes; and those things would lead off under the deck.

Q. I see what you mean. I don't see that it has much bearing on the case but I see that point. What else have you?

By Mr. Eggleston:

Q. Captain, did you inspect the Cullen No. 32 in August, 1925, at the foot of Roosevelt Street?

A. I don't think it was 1925. If you will allow me to look at my survey report (referring to his report); I have it here marked.

Q. At the foot of Roosevelt Street?

A. That was August 13th.

Q. You saw the Cullen No. 32 at the foot of Roosevelt Street?

A. I saw her there.

Q. That was after the accident?

A. That was after the accident.

Q. Will you tell us what you found there and what you did?

A. I found that that boat was turned over. There was about 8 feet of her hooked over the end of a Long Island carfloat and that had broken up the top log and covering board and the side of the boat so that she was more or less in the shape of an anchor stock on that side.

By the Court:

Q. Was she in shape then for anybody to make a diagnosis of what caused her to turn over?

[fol. 136] A. I don't think so, your Honor; there was too much of her under water.

By Mr. Eggleston:

Q. When next did you see this boat?

A. At the Jersey City Drydock at Jersey City.

Q. Will you tell us what you did in the way of inspection, up at the Jersey City Drydock, and what you found?

A. We held a survey for all the damage that could be attributed to striking the piling when she turned over at the bow, striking the carfloat and the consequence of having sunk was that the hatches had floated away on her turning over; one consequence of her turning over would be the cargo had started to rip the coamings off the side which would take the covering board and the freeboard strake probably with it. And we made a note of all those damages and reported on them.

The Court: Who was there at the survey?

The Witness: If I remember rightly—I could tell by looking at my survey.

The Court: All right.

The Witness: There was Herbie Morrison.

The Court: Whom did he represent?

The Witness: The Shipyard.

Q. He is dead now?

A. Yes, he is dead; and A. H. Dumont of the Home Insurance Company.

Q. Whom did you represent?

A. I represented the Cullen Barge Company.

The Court: Was the Long Island Railroad invited to be present—did anybody represent them?

[fol. 137] The Witness: There were others there but I am not sure—it is a long time ago, your Honor. There were six or seven there but who the others were I don't know. I know Captain Bagger was there.

The Court: Old Captain Bagger?

The Witness: No, William Bagger.

The Court: He is a son?

The Witness: And I think Frank was on the one at Jersey City.

Q. Whom did the Baggers represent, if you know?

A. I think they told me they represented the cargo.

The Court: You don't know?

The Witness: I am not sure.

The Court: Is there any question that this was an ex parte affair?

Mr. Eggleston: The Long Island naturally wouldn't be there for Cullen wasn't looking—for the Cullen Company——

Mr. Martin: We weren't there.

The Witness: There was more there besides Captain Dumont and Captain Bagger.

Q. Tell us what you did in the way of inspecting the boat and what damage you found in general; you may refer to anything to refresh your recollection?

Mr. Martin: I have no objection to the survey being offered to show that these things were found broken on the boat when he looked at her. I don't want it admitted as in any way binding on me.

[fol. 138] Q. Is this the original survey?

A. Yes, a copy of it.

Q. Will you tell us in general the nature of the damage you found on the boat?

A. Well, at first the cabin was damaged. Do you want me to go over it all?

Q. In general?

A. Well, the cabin was damaged. The hatches, which usually float off, were gone. The side of the vessel, the top log and the cabin board——

By the Court:

Q. The top log on which side?

A. On the starboard side. And the top log on the port side was broken when she fell over. The covering had gone away on both sides and a number of planks.

Q. The top log was broken on both sides?

A. No, it was splintered on one side—at least I am not sure until I read this thing.

Q. Well, get it right?

A. Cabin broken and damaged, to be new; necessary doors and lockers as before. One piece of sill broken to be new. Stern capstan broken, to be new.

By the Court:

Q. There is no use reading it into the record. Just say what were the notable things you saw?

A. On the port side, top log broken to be new—

Q. What side was that?

A. That was the side that was against the derrick, the hoist.

Mr. Martin: Well, wait a moment; not when you saw her, when she was turned over?

[fol. 139] The Witness: I saw her when she was turned over.

The Court: As she originally lay, as I understand it, this end was out toward the river.

Mr. Martin: I think it was bow in.

Q. All right; top log on the port side broken, you say?

A. Broken. 12 pieces of decking broken port side, to be new; 8 pieces of decking broken in salvaging operations. Bow chock rail broken, to be removed and replaced on new rail; one bow hatch cover damaged, to be repaired; forward capstan cover missing; bitt cavills broken; two main beams broken; 16 deck carlins; 9 knees broken, to be new; 11

knees to be removed and replaced, if broken to be new; 5 wing bulkhead knees to be new; one kingpost——

Q. What is the bulkhead knee?

A. You have bulkhead knees—and it is fastened on just like that (indicating to the Court on the model). Top strake of one wing bulkhead broken, to be installed in one piece; that first strake below top log was broken——

Q. Which side?

A. This is all on the port side, your Honor. Third strake below top log, sixth strake below top log, second strake below top log; scarves and bilge logs started, to be refastened after being set back in place. She fell over like this and broke all these planks and she opened this way, too (indicating on the model); scarves and bilge logs started. This happened when she was hanging over the bow in this shape.

Q. You mean sprung out?

A. Sprung out, and naturally these scarves opened. [fol. 140] Now, all scarves in fore and aft keelson to be refastened where started.

Q. That was the recommendation?

A. Yes, wherever they were found started it was damaged. Well, this is the starboard side: Lower course of log rail broken. This is the lower course here.

Q. What do you mean?

A. This cargo rail, you may call it, the lower course was broken. The middle course and the top course of log rail were broken. The anchor stocks were broken; two corner rail irons to be removed, faired and replaced.

(The witness explains to the Court what this means.)

A. (Continued.) Staving on both corners to be removed and renewed. Five pieces of decking broken, to be new; there were six kingposts broken; there were nine 6-inch knees broken. Ten knees to be removed and renewed if broken on removal. Two wing bulkhead knees broken to be new. One rider knee broken to be new. There was a lot of flooring and bulkheads on both sides at both ends missing to be new. There were four center bulkhead knees broken to be new. Forward and after cargo bulkheads broken and damaged, to be repaired. There were two deck pump and piping to be overhauled and put in working order; one deck plank lifted over each force and aft

bulkhead after boat is set back in line bulkhead to be edge bolted with five foot bolts. To strengthen this vessel we took up the deck planks, every other one to refasten that fore and aft bulkhead. They don't put it down through the deck planking, it is too heavy.

Q. These are the things that you were going to do.

A. To put her back in her same condition.

[fol. 141] Q. Is that approximately all?

A. No, there is a little more. There were 11 bottom planks broken, to be removed and renewed; 4 corner rake wearing pieces broken to be new; all bitts where started to be set back to place and refastened

Q. Don't read them. You have covered practically all that was noticeable, anything that you could possibly base a diagnosis on of what happened?

A. Your Honor, we went all over this boat looking for the damage that had been done by turning over, striking the dolphins, the piling and hanging on the bow of the boat and we couldn't find anything that had to do with the boat that would cause it.

Q. You mean to say she was tight then?

A. No, but outside of this, that was all we found that was the matter with this boat.

Q. It sounds to me like an old injury as you read it to me; but isn't it possible for a man of your experience to say that some part of that was due to the blow she received when she struck the piling and the Long Island lighter, probably; all you could do was to assume it from experience, that it was probable and that something else was due to some other cause?

A. If there had been anything due to any other causes, other than striking—when she turned over and the cargo went off—and striking the bow—this reasoning leads up to what we would say is the result.

Q. So it doesn't take you back to the cause of the sinking in any way?

A. No, not the sinking.

Q. Now, have you ever seen or had occasion to examine any other deck scow similar in a general way to her which had a similar thing occur to her?

A. I must have examined in my time forty of them.

[fol. 142] Q. I suppose it is seldom a deck scow when it

turns over is so malignant as to hit something else; it generally turns over and dumps her cargo?

A. If you have pig iron on, or copper bars and she started to list over; as soon as the iron started it would take this rail off, and the hatches, and it would all go overboard. It would break this other plank and the chances are it would all go overboard, and the boat might go back on her bottom.

Q. Is the deck watertight?

A. The deck is watertight, but when the pig iron would go off her it would split this rail and the filler work.

Q. That is to keep the water from getting in the hold?

A. Yes, but if the pig iron started to slide it would go so quickly that it would all go off before the boat turned over. If you put sand or gravel or trap rock on or a cargo such as this boat had on with a boat like this it would hang on like this.

Q. It would keep dribbling off the top all the time and it would change and change and change, and it would tip this thing over a little bit and when the angle got sharper it would run off more and more and you wouldn't get rid of it until it got to the angle of repose. You understand that?

A. I do.

Q. With a cargo of any kind, sulphur or clay or mud, it will stop where it is when you pile it up?

A. With a cargo like this it would go on an angle a litfle less than soft clay, what you call an angle of repose we call a natural angle.

Q. Angle of repose is a word of art. What is this?

A. It is copper ore.

Q. Well, it is what they call—this copper ore, isn't it lumpy?

A. It is lumpy.

[fol. 143] Q. Not a very sticky substance?

A. There is nothing sticky about it at all. The angle of repose is a little less than coal, for coal has sharp lumps and this is round.

Q. Therefore it is flatter on the angle of repose?

A. Yes, it is flatter but it will move quicker, for coal has square lumps and this has round or a similar shape lumps.

It will shift a little quicker than coal—soft coal I am speaking of, not hard coal.

The Court: If, as one of the witnesses testifies yesterday, the scow listed over so that the starboard side of her deck away from the hoister was only 2 feet above the water, that would mean a list of substantially 15 degrees.

Q. Now, that is quite a list when you look at it?

A. Do you want my opinion of it?

Q. Yes.

A. My opinion is that if any cargo was liable to shift it was a dangerous list.

Q. Was this copper concentrate?

A. Some, not a great deal.

Q. Would it start to shift at that list?

A. Oh, yes, the top would, not the bottom.

Q. But sliding and shifting are different things?

A. When they start to load these boats they dump it on the center line, then it becomes packed and the other all goes down——

Q. It slides off on each side?

A. It slides off on each side.

Q. If a man comes along with a cart and he bangs it down you think you can remedy it?

A. If you throw gravel or dirt down with a shovel, to show you how much difference it makes in the packing—[fol. 144] certain men can put loads of salt—you can put in salt so it won't go up on your cargo, so it won't pack. The same here. If you put the copper ore in and start at the center line and let it drop from your tub or scoop or anything, as the other comes on the deck it will continue packing; but if you start on the side of the boat and give a list there it will be more solid and she will have an original list from the start.

Q. I see.

A. And the only way to offset it would be when they load it they would have to put some on this side.

Q. You would have to get a similar packing on the other side?

A. You would have to pile higher. Soft coal in the hold of a ship will pack so tight you have to pick it out.

Q. Now, the packed area extended fore and aft?

A. On the center line.

Q. But if you put it on the side you have it there?

A. Yes. It is the first half of the load that is packed, or a quarter.

Q. Well, now is this a fair statement that I have got down here: If you load a scow in the center at first with material like this or approximately like it, coal or anything like this, you have as an effect of the impact of the various draughts a packing of the cargo in the center and you have a scow that will not materially list one way or the other?

Q. If, however, you start loading on one side or the other——

A. Or near one side.

Q. —and do it the same way that you might have done it in the center, you have a fore and aft area of packed cargo which is of course slightly heavier in its cubic foot than the unpacked cargo, and it will tend to list one side or the other. Then if you try to remedy that kind of loading [fol. 145] by putting a similar fore and aft packing on the opposite side you get a tender boat, I suppose?

A. But, your Honor, when this is put on this side and packed, this stuff is run across to this side; you couldn't start on this side again and pack it; you would have to shovel it over considerably more and instead of having it come up like this you would have it come up like that; you would have to have a top (indicating).

Q. But the net result if you have a list of any kind and try to remedy it by loading on the other side, whatever method you follow, the result is that you have a boat with a greater tendency to tenderness than if you load it in the first place and let it dribble off the side?

A. Yes.

Q. That is, I should think so. Mind you, I know very little about this kind of water craft. Is that the point?

A. I think it is.

Q. How much can you tip one of those vessels with cargo on her safely; if this doesn't give way, if the cargo doesn't tear it out and cause a leak, if you have a perfectly sound boat, how much can you tip; I suppose it would have to tip quite a little?

A. It depends on the cargo, your Honor, whether it was shifted. If you take brick, of course it isn't liable to roll down or shift; you know just what you have; but if a cargo is liable to shift I should think a point of 10 or 15 degrees would be the limit, especially with any cargo that is likely to shift. Of course, your Honor, I must tell you this, so as not to be misleading, deep down, say that boat was 2 feet deeper, she will have less list than one that is shallow for this body is big, and the more you shove this down in the [fol. 146] water, the greater pressure in the water—the deeper the boat the less list she is likely to turn over with, with the same cargo on the deck.

Q. In other words, if you have a raft it is harder to turn it over?

A. I wouldn't say that, for there is water all around it. But a very shallow boat will not turn over as quickly as a deep boat of the same width. We have scows in New York of copper, McAllister's boats, and they are shallow beneath. That is, a 12-foot boat will turn over quicker than a 10-foot boat of the same depth.

Q. You mean depth of side?

A. Depth of side.

Q. We are talking about depth of side here, not draft of water.

A. Yes, depth of side.

Q. With the same shaped bottom all round?

A. Yes.

Q. Well, did you ever know one of these boats to turn over if she didn't have any water in her?

A. I never could tell whether they had water in them or not.

Q. You have examined these boats for damage by accident many, many times and do you mean to say that unless you hear water trickling into them they are not leaking?

A. There must be some phenomenon, there must be something to pour this thing out, I will call it traumatic, but whether it was due to a leak that developed as they went lower and lower and the water came in stronger as the pressure of the cargo rolled the boat around, or you would call that an organic defect in the boat—isn't there any way of telling?

A. Most of the boats that we have are coming from Port Jefferson, up Long Island Sound, and I don't know of any that turned except in heavy water, and they strained.

[fol. 147] Q. They must have got water in them?

A. Yes, but they were loaded decks to the water, not more than 6-inch freeboard to the leak. And the water in those boats may have gone over into the hatches.

Q. I was thinking about here in the harbor where things are calm and every now and then you hear of a scow turning over and dumping her cargo?

A. Well, I have known a lumber boat to turn over and spill her cargo right in Brooklyn at a dock.

Q. That might be from having too high a center of gravity, that is understood. It might be from building the boat so tender——

A. She came down the Hudson on the Jersey side with all the boats and they put her in the dock and went to hoist the derrick aloft and the sling got away from them and over she went; and she come back again, she just turned over enough to dump all her lumber and come right back again.

Q. Evidently that boat wasn't leaking; did you examine it?

A. We examined it and found she was overloaded.

Q. But you couldn't pile this sort of a cargo which is under discussion here to such a height that you could raise the center of gravity so that she would turn over?

A. I think you could, your Honor; she is 28 to 30 feet, I don't know that boat, I should judge that.

Q. Coal at the normal is 40?

A. Soft coal, yes. Hard coal about 32. I might be mistaken in that.

Q. But it is a greater specific gravity than coal?

A. Yes. And there is more—I don't know that it is very much more than half rock.

Q. Well, it seems to me it is a curious thing. When that [fol. 148] was filled up to her maximum capacity would it be over the top?

A. With this concentrate, no, I think it would hardly come to the top of it.

Q. What do you call those things?

A. There, cargo aprons or bulkheads some call them, cargo bulkheads.

Q. And they are about 10 feet high?

A. About 10 feet.

By Mr. Eggleston:

Q. Captain, have you known of deck scows in the harbor loaded with chalk or ore having spilled their loads.

A. I don't remember any of them.

Q. You have testified to a great many broken beams and planks and so forth that you found on the No. 32; could you tell from your inspection of the scow whether the breaks you found were old or new breaks?

A. They were new breaks, they were from that damage.

Q. Did you find any old breaks on the scow?

A. Not in my recollection, it is not my report.

Q. Now, in inspecting the scow did you look over her caulking or did you see the caulking oakum in the seams?

A. We went carefully over the boat while she was in drydock and we couldn't find anything about that boat other than what was caused by the damage, why she should turn over.

Q. What was the condition of the oakum, the caulking that you found?

A. The only caulking that I could see in it, of course we tried around the corners and ends with a trier, but the only oakum I could see was where she was broken; we walked up on this boat while she was turned over, there were big sheaves of oakum hanging out of the broken seams.

[fol. 149] Q. In what condition was that?

A. That was in good condition.

Q. Did you say you tried out the oakum?

A. When we went around the boat we tried with a trier the various seams that were broken.

Q. And that was at the Jersey City dock, while the boat was in drydock?

A. Yes, sir.

By the Court:

Q. And you walked on her while she was upside down in the East River as she was hanging there? That is a picture of her, they tell me?

A. Yes. This is the side we walked up, on this side, not that side.

Q. And this was the bottom?

A. No, this was the bottom.

Q. This was the bottom where you walked?

A. This was the bottom, that was the top where she is hanging.

Q. This is the carfloat?

A. This is the edge of the boat.

Q. Is this the bottom or the side?

A. No; she wasn't quite in that position when I saw her; she was further over than that, she was hooked over.

Q. But she was on top of the carfloat when you saw her?

A. She was hooked onto the carfloat just like that—hooked on to the outward downstream corner of the carfloat.

Q. And if you walked up on her side——

A. I walked up on this side of the boat.

Q. Towards the ——

A. Towards the top of her.

Q. And found this oakum?

A. Well, in a number of places where the planks had been broken it started the oakum, and it naturally fell out.

[fol. 150] Q. And that oakum was in good condition?

A. That oakum was in good condition.

By Mr. Eggleston:

Q. I understood you to say when you examined the boat while she was in dryrock at Jersey City, you went around the boat and examined the caulking?

A. We were looking to see if there were any leaks.

Q. What did you do to examine the caulking?

A. We tried it with a trier I have, like an icepick.

Q. What condition did you find the caulking to be?

A. We couldn't find any condition that caused the leak other than these breaks, not only myself but others.

Q. Aside from these fresh breaks that have been referred to, what was the general condition of the 32?

A. She was in good condition.

Q. Now, assuming, Captain, that No. 32 had a load of ore aboard and spilled that load, turned over and struck a

pier and struck a carfloat, in your opinion would that be a competent producing cause of the damage that you found on the boat at the time of the survey?

A. It was.

The Court: It would be?

The Witness: It would be.

Mr. Eggleston: I offer the survey in evidence.

It is received and marked Cullen Exhibit A of this date.

[fol. 151] Cross-examined by Mr. Martin:

Q. Mr. Gardner, the proper way to load this boat would be to dump the first bucket in the corner of the boat, wouldn't it?

A. In my opinion, yes, the center line; I wouldn't say exactly the center of the boat.

Q. I don't mean the middle between bow and stern; I mean the center line of the boat?

A. Yes.

Q. And then put a load on either side of that?

A. Yes.

Q. And then do the same thing over again?

A. Yes.

Q. And do the same thing again?

A. Yes.

The Court: You make a series of triple piles so to speak.

Q. And if you had a bucket with a latch on and a man to loosen the latch the bucket would be down close to the deck for that purpose, wouldn't it?

A. Where the man could reach it, within a few feet.

Q. And that would be a very careful way of loading?

A. It would.

Q. You would have no complaint on that, would you?

A. No, I would not.

Mr. Martin: I expect to prove that that was the way this boat was loaded.

Q. This material isn't piled high, is it, to make a full cargo?

Objected to.

Question withdrawn.

The Witness: It isn't carried for cubic capacity; it is dead weight cargo.

[fol. 152] Q. It wouldn't go up to the top of the bulkheads, would it? A. In my opinion it wouldn't.

Q. How far do you think it would come, to the top of the bulkhead?

Mr. Eggleston: Objected to.

The Court: We are talking about this kind of cargo and the witness seems to know about it; all we want for a background is how this cargo can be loaded on this sort of a boat without turning over. If she is in practically good condition previously you couldn't put her 20 feet high for she would tip; you might put it 10.

The Witness: You might put it 10 feet here, but put it as they do trap rock or stone, it makes a difference whether you come up this shape or in this.

Q. How far a boat will tilt depends on how much water there is in it?

A. Yes, a boat with water in it——

Q. And if there is water in her she is what we call cranky?

A. Yes, but some boats are cranky without water.

Q. Now, the natural thing to do with a boat of that kind would be to give her a slight list toward her pump?

A. Not a list, a tip.

Q. A tip or whatever you call it towards her pump?

A. Yes, a little; as a general thing they do, with grain boats, not with these cargoes.

Q. But they do with any boat?

A. If she is dead level they will get it out.

Q. Suppost this boat has 2 inches of water all over her and she goes and meets a steamer coming along, she will begin to roll?

A. Yes.

[fol. 153] Q. And there is much more danger of that water rolling in meeting swells; if she is so stowed that they can pump it out?

A. That is a set for pumping purposes, an inch list will do that.

Q. And it is proper to give her a list of 1 or 2 inches to her pump?

A. If I had any doubt about her leaking I would.

By the Court:

Q. Would an inch or two make her liable to tip?

A. Hardly, your Honor; it would be only 2 inches of water you would be loading the boat too near the danger line; 2 inches of water is very little.

By Mr. Martin:

Q. Well, when you draw down to the corner by a 2-inch list with 2 inches of water how much——

A. Well, there is 63 pounds to the cubic foot, about a ten and a half.

Q. So that you think it would be ten and a half to 2 inches?

A. It would be equal to ten and a half of cargo on deck; not ten and a half down below.

Q. When you speak of the good condition of this boat, you examined her to find old breaks, did you?

A. Yes, I was there to find anything I could which made that boat go over.

Q. And you don't know how the caulking was in any of the seams, do you?

A. I didn't go over every inch of the seams but I went to the place where the boats give out first, the corner chime seams and scarves and the butts.

Q. But they were all started?

A. No, on this side where she broke, on the other they might be dry, but not enough to leak.

[fol. 154] Q. You say the butts and scarves on the port side were not started?

A. Some of them were up here and we tried around and didn't find any.

Q. And it was up on top of the seams where the boat is let lie that leaking starts in most boats?

A. Not always; if they are not loaded properly, if they are loaded too heavily in the middle, if you put the cargo here she will open in the water and if you take the cargo out she will go back again.

Q. Now, as I understand you, she might be too heavily loaded in the side or in the middle?

A. No; speaking generally——

Q. This boat wasn't hogged, was she?

The Court: He is just explaining things.

The Witness: If she is loaded badly in the center first, sometimes we load them heavier on the sides and squeeze the bottom together.

Q. To test caulking what do you do?

A. To test caulking?

Q. Yes.

A. I try it with my trying iron.

Q. What is that?

A. Something like an ice pick but a little flatter; we shove it along the oakum, not into the oakum, to see if the oakum is tight in the seams.

Q. That is the only way you can tell?

A. That's right. I have done lots of caulking.

Q. Oh, I understand that. I have no argument with you. Did you get bids on this work?

A. Yes.

Q. How much was the coat of repair?

A. I don't know; they took the survey away from me.

The Court: Let him have it back again. Can't we agree on what it was. Is it on this?

[fol. 155] The Witness: No, it isn't in here but I have a copy somewhere, where I had it on—here it is, Jersey City Drydock 8950, 22 days. James Tregarthen, 9-5-10 25 days. Crandall Drydock 9480, 26——

The Court: You gave it to the Jersey City Drydock, did you?

Mr. Martin: We didn't give it to anybody.

The Court: What did they do?

Mr. Martin: Afterwards they used her for a float.

Q. Now, Mr. Gardner, how much did a new boat of this size cost in 1925?

A. A new boat?

Q. A boat; I think she is described as 112 by 33 by 12?

A. Well, I wouldn't dare to make an estimate on that boat without loking at my records.

Q. You know the cost of a scow at that time?

A. I am getting mixed up on the year.

Q. Well, I will make a rough figure——

A. Wait a minute; three years ago you could build a scow larger than her for about $17,500.

Q. They ran from $16,000 to $17,500?

A. Yes.

Q. And this boat could have been repaired for $8,950, to make the repairs in this survey?

A. She wasn't a new boat.

Q. I know she wasn't a new boat.

By the Court:

Q. Was she worth repairing?

A. No, sir.

Q. She was so much jarred that it wasn't worth while?

A. No, and in my opinion, by the look of her she was twelve or fifteen years old, anyway.

[fol. 156] By Mr. Martin:

Q. How much was she worth in her damaged condition?

A. No commercial value.

Q. How much did your put on her?

A. I didn't put any on.

Q. It was said to be $250?

A. Well, somebody might have wanted her to use as a float or as a commercial boat to repair again; I should say she was of little or no value.

The Court: I am not interested in the value.

Q. How was this boat turned over; was a wrecking company used?

A. I recommended the boat be lifted off the carfloat, turned back and taken to a drydock for full survey. That was my recommendation. I also surveyed the carfloat.

Q. Now, it was nothing unusual in taking cargo off of a deck scow for her to take a considerable list to one side when the cargo is removed from the opposite side, is it?

A. Brick?

Q. Anything?

A. Not always.

Q. I am not speaking of not always, I am speaking of that condition existing?

A. Not always; if they have a pull wheel bucket they might leave a corner here and a corner here. It was wrong for it will twist the boat.

Q. You have often seen scows being unloaded?

A. With bucket cargoes?

Q. With any?

A. Other cargoes we don't have them and give them a list.

Q. What kind of cargoes have you seen being removed where you had lists?

A. With bucket stuff, where they used a pull wheel.

[fol. 157] Q. And how much of a list have you seen?

A. Little or no list, but more often they will have it in the corner like this——

Q. I am not talking of twisting a boat, Mr. Gardner; I am asking a plain question; you have always seen boats list when the cargo is being taken off until they got the cargo off the opposite side?

A. Well, when they are half or two-thirds discharged they may have a little list on them.

Q. When you take cargo off you have a list right away?

A. They give it a little list.

By the Court:

Q. Why?

A. To keep it from swinging around. You take a little brick off one side and wind them around and take the brick off the other side.

Q. You wouldn't consider a 15-degree list in a boat like that of any danger?

A. Yes.

Q. How much list do you think without water in the boat would have any effect?

A. A point, that would be 11 degrees.

Q. That is without water?

A. Yes.

Q. And if she had water in her she couldn't take that much of a list?

A. That is near the danger line I am speaking of now.

Q. Now, after all your examination of this boat you couldn't tell the cause of her overturning, could you?

A. No, I couldn't.

Q. And none of the surveyors could?

A. No, we couldn't find out why she turned over.

Q. The seams naturally were opened up when you got there?

A. Yes, from the turning over.

Q. You don't know what opened them up; some of them may have been opened up from turning over?

[fol. 158] A. The boat had struck the piling, had turned over on the float and had been lifted off the float and turned over by the salvage people.

Q. Well, what seams were opened when she turned over you don't know?

A. All the seams that were in that boat that was damaged was done by the fact of her turning over and striking the float and the boat also turning back.

Q. That is your opinion?

A. But they never showed up.

Q. They were all open when you examined them?

A. They weren't all opened.

Q. But many of them were opened?

A. Yes, where she was broken.

Q. And on the opposite side from the strain?

A. Yes.

The Court: The strain was all over her.

Q. Whether she was opened before that or not you nor nobody else could see unless they saw the seams?

A. If you take the caulking from one side and find it good there must be the same oakum continuing along on it. They are edgebolted and between the edgebolting they have 5 inches of caulking and on the other they have only 2½ or 3. The edgebolting goes down through the 6-inch plank and there isn't as much caulking on that.

A short recess.

After the recess.

[fol. 159] FRANK GARDNER resumes the stand:

By Mr. Martin:

Q. Mr. Gardner, I understood you to say there was two inches of water over the bottom of this boat, or thereabouts; that would amount to about a ton and a half of water?

A. That was only my guess at it.

Q. Would you be surprised to know that it would be about 16 tons?

A. I didn't imagine it would be as much as that.

Q. That would have a pretty serious effect on a boat?

A. 16 tons?

Q. Yes.

A. It is not light on the top. If she was upright 2 inches wouldn't be so much.

Q. We are speaking of a list or what you call a little tip?

A. 2 inches of water, the pump wouldn't suck it.

Q. But that meant 16 tons of water down below?

A. You said so; I didn't say so.

Q. If she had 16 tons of water down below, that was quite a lot of water?

A. Yes.

Q. Well, take 100 by 26——

The Court: You calculate that out; I think it sounds extraordinary. Don't let us waste time with him. The witness doesn't believe it and I don't believe it—I may have to believe it.

The Witness: 2 inches of water, the pumps wouldn't suck.

Mr. Martin: We are speaking now with the tip that you speak of.

[fol. 160] Q. This caulking iron that you use; will you say what that is?

A. I didn't say a caulking iron; I user a trier; it is like an ice pick.

Cross-examined by Mr. Middleton:

Q. How hard do you jab this trier in the seams when you test the oakum?

A. Well, I drive it as hard as I can for my hand to try it. You wouldn't care to have me try it on you that hard.

Q. I would like you to tell us something about the stability of the scow. Isn't it so that the scow being off here on the bottom and with a heavy cargo on the deck has the center of gravity pretty high?

A. Yes.

Q. And it is apt to list and spill without very much list; I mean it doesn't take much list to make the scow careen and dump her cargo?

A. You mean she is tender, she is cranky; it doesn't take much to make her take a list?

Q. Yes.

A. No. The more you put on the deck the more she will list.

By the Court:

Q. That is the result of the water coming upwards as she gets deeper and deeper and raising the center of gravity?

A. Yes, sir.

By Mr. Martin:

Q. You said a scow with less draft would be better for that business?

A. I said a scow with 12-foot sides wouldn't be so cranky as a 14-foot scow.

Q. You spoke of McAllister's boats?

A. They are shallower boats and wider, therefore they [fol. 161] have more stability, the center of gravity doesn't go up on them so fast as you load them.

Q. So you consider those boats cranky boats?

A. No, I consider them a good average deck scow.

By Mr. Shortridge:

Q. What is the capacity of this scow; is it 700 or 800 tons?

A. I never worked her out; I should judge from her dimensions or 800 tons. I don't want to say that for I haven't worked it out.

Q. It would be 33?

A. 7 by 33, and the average length of her would only be 100 feet. That would make say about 95.

Q. What you are giving me there is what would be her displacement?

A. Yes; multiply that by 63 pounds——

Q. 64 pounds for salt water?

A. Well, some salt water, but 63 in New York harbor.

Q. And you have to subtract the actual weight of the scow?

A. No, you do not for you have taken off your draft; then you divide that by 2,000 tons and it would give you the length——

Q. 95 times 33 times 7/6?

A. I wouldn't say 7/6: I don't know what she drew light.

Q. The testimony seems to be that her deck was 3½ feet above the water?

Mr. Martin: Light she drew 2 feet.

Q. That would give 6½ feet she would be immersed by putting a load on?

A. Well, taking immersion——

Q. Multiply by 63 and divide by 2,000?

A. Yes, I see; I would use another method and multiply by 32.

[fol. 162] By the Court:

Q. What would you get as her capacity?

A. About 800, but I may be wrong.

Q. You would say 700 to 800 tons?

A. Yes.

By Mr. Shortridge:

Q. As this scow reaches more nearly the completion of her loading does it take a larger or smaller quantity of cargo away from the center line to affect the list?

A. What is that?

Q. When you take a larger or smaller amount of cargo away from the center of the ship that will give a list, if your scow is completely loaded——

A. It would take less cargo on top—flat bottom boats are very safe when they are light.

Q. When you are very nearly completely loaded a small quantity of cargo out from the scow will produce a greater list than earlier in the loading, is that right?

A. Yes.

Q. Now, going back to the 2 inches of water, 2 inches evenly distributed over the bottom will produce in tons something like—a boat 90 feet long and about 30 feet wide by the 2 inches, which is a sixth of a foot, is 63 divided by 2000?

A. But remember you have to take out all these stringers, all the keelsons——

By the Court:

Q. I don't think 2 inches could roll around very much?

A. It couldn't. These stringers take up nearly as much room as the water does; you have to split them to make it right.

[fol. 163] By Mr. Shortridge:

Q. You say you don't get the uniform 2 inches until you are above the keelsons?

A. No.

By the Court:

Q. How big are the keensons?

A. 12 inches; 2 inches of water over that boat, you would have to take the stringers out and if it went higher than that you would have to take the floor frames out and if it went higher than that you would have to take the fore and afte bulkhead out.

Q. Is there any connection between these?

A. Some have a little side board——

Mr. Martin: He testified that the water could flow from one to the other freely.

By Mr. Eggleston:

Q. Mr. Gardner, what is the height of the stringers above the bottom planks?

A. Of the fore and aft stringers?

Q. Of the fore and aft stringers?

A. 12 inches.

By the Court:

Q. Do you mean keelsons?

A. Yes.

By Mr. Eggleston:

Q. Are there scuppers in the keelsons?

A. Usually.

The Court: They did testify there were some sort of scuppers in the fore and aft bulkheads.

[fol. 164] Q. Are there scuppers in the keelsons?

A. Yes, there are scuppers in the keelsons next the plank.

Q. How many keelsons did this boat have—how many does the ordinary boat of that size have?

A. Seven; I think this boat in the bottom had more.

Q. And what are the sizes?

A. They would be 8 by 10 by 12. I am not sure about that size.

Q. What would be the width between?
A. 8 inches wide by 12 feet.
Q. What would be the size of the floor frames?
A. The cross floor frames?
Q. Yes.
A. Not less than 12 by 12.
Q. And how many floor frames would there be in a boat of this size?
A. With 5 feet between centers—I don't know whether she is built 5 feet or 8 feet or what, between centers.
Q. How many would you expect to find?
A. Divide 5 into 100—there would be 12, anyway.

The Court: There wouldn't be 2 inches of water at large to create impact against the side; it would be broken up so that you wouldn't get the same effect as if you had a big empty still pool or something.

Q. You have seen the pumps in a great many deck scows, haven't you?
A. Yes.
Q. How are the pumps set in ordinary deck scows?
A. Less than 2 inches.
Q. What do you mean by that?
A. From the bottom. If they put them nearer the bottom than that they would draw it in from the space between the frames; if you have them too close if you pump too fast it sucks at once.
Q. If you have a pump 2 inches from the bottom and the boat is on an even keel how much water must the scow have [fol. 165] in in order to operate the pump?
A. 2½ or 3 inches.

By the Court:

Q. You never can get 2 inches out unless she is tipped in some special way?
A. No, unless, as I testified, you tip them a little bit.

Mr. Martin: That is the way they load them, your Honor.

By Mr. Eggleston:

Q. You were asked if water in the hold of a scow would affect the list of the scow?
A. I would want to know how much. With 2 inches in the bottom of the scow and she was dead upright you wouldn't know it was there.

Q. Would the trim of the cargo make any difference?
A. If you give her a little list you would know there was water there.

By the Court:

Q. Even with 2 inches?
A. I hardly think with 2 inches; it is too small.

By Mr. Eggleston:

Q. Would the trim of the cargo affect the list of a boat with no water in her?
A. Yes.
Q. And the kind and weight of the cargo?
A. Yes, the more bulky the cargo, the higher it went, it would all affect her.
Q. Those are all important factors. Now, when you examined the caulking of this boat over at Hoboken, did [fols. 166-171] Mr. Bagger go around with you?
A. He did.
Q. Was he with you when you used the trying iron on the caulking?
A. He was.
Q. And whom did he represent?

Mr. Middleton: I object.
The Court: It doesn't make any difference; it doesn't affect me at all.

A. I am not sure.

[fol. 172] Testimony for the Hedger Company

Stanley W. Pierce, being duly sworn and examined as a witness for the Hedger Company, testifies:

Direct examination.

By Mr. Middleton:

Q. Are you associated with the W. E. Hedger Company, Inc?
A. Yes.
Q. In what capacity?
A. Vice president.

Q. Were you so associated with Hedger in August, 1925?
A. I was.
Q. Do you recall the steamer Berk arriving in New York in that month?
A. I do.
Q. Was Hedger requested by the Grasselli Chemical Company to transport the cargo on the Berk from the New York pier to Grasselli, New Jersey?
A. Yes.
Q. Were you in charge of that work for Hedger?
A. I was.
Q. In connection with that work did you charter any scows?
A. I did.
Q. Among others you chartered the scow Cullen 32?
A. Yes.
Q. How was that work to be handled, the work of getting the cargo from Roosevelt Street where the cargo was, to Grasselli?
A. We were asked by Grasselli to arrange for the transportation, to arrange for the stevedoring and to arrange for the towing to their plant.
Q. And did you employ the Port Fueling Corporation to do the moving?
A. Yes.
Q. As I understand the way you handle it, you had the scows brought to Roosevelt Street?
A. That's right.
[fol. 173] Q. And the Port Fueling Company loaded the scows?
A. Yes, sir.
Q. And the Port Fueling Company would then report to you that the scows were loaded, is that right?
A. That's right.
Q. And you would then communicate with one of your tugs to pick up the scow and take it to Grasselli?
A. That's right.
Q. When the scow Cullen 32 was in the slip at Roosevelt Street did you or anyone connected with Hedger have anything at all to do with the scow?
A. Other than landing the boat there, when she was landed there——
Q. You hadn't anything to do with the scow?
A. No.

Q. Did you entrust that scow to the care of anyone other than the Port Fueling Corporation?

Mr. Martin: I object to that.

The Court: He engaged the scows and became a demise charterer and then he had them sent around there in some way to load; don't try to redefine the relationship but tell me what was done; I think that is what it really is boiled down to—he was a demise charterer.

Q. What, if anything, under your agreement with the Port Fueling Corporation was the Port Fueling Corporation to do in connection with these scows?

The Court: Was it in writing?

Q. Was it oral or in writing?

A. It was oral. We arranged with them to provide a [fol. 174] berth for the steamer and we would put the scows alongside and they would load them and notify us when they were ready to tow and when they wanted more scows we would take the loaded ones away and put light ones there.

By the Court:

Q. This is what it amounts to, that the Grasselli Corporation, having a cargo that they wanted taken to New Jersey, asked you to get some marine equipment and to unload it and bring it over to them and you looked around and you took this Port Fueling Company or whatever it is called, to be the stevedores and you arranged for some scows to go over there and you arranged a dock for the vessel to lie at?

A. They did.

Q. Who is they?

A. The Port Fueling.

Q. And she went there and between you and the Port Fueling Corporation who were sub-contractors to you, you arranged to have these boats come over and be filled from time to time, didn't you?

A. Yes, sir.

By Mr. Middleton:

Q. Did anyone acting on Hedger's behalf ever inspect the scow No. 32 before she went under charter to you?

A. No.

Q. And when you chartered this scow from Cullen did you state the purpose for which she was to be used?

A. I did.

[fol. 175] Cross-examined by Mr. Eggleston:

Q. Mr. Pierce, there has been a libel filed by W. E. Hedger & Company, as bailee of the cargo on the 32; you filed a libel as bailee of the cargo?

A. I believe we did.

Q. And you know of the 32 throwing the cargo?

A. Yes.

Q. Who did you have examine the Cullen No. 32 after she threw the load?

A. I don't really know.

Q. You had someone?

A. We had no direct representative.

Q. Well, you had somebody go over and inspect and examine the scow 32 after she spilled her load, didn't you?

A. I don't believe so.

Q. You don't know whether you had anyone go over and examine her or not?

A. I have no record of having anybody go.

Q. You won't say you didn't have anybody examine the scow on your behalf, will you?

A. So far as I know, there was nobody.

Mr. Middleton: I am willing to admit that Captain Bagger examined this scow on behalf of the cargo underwriters.

Cross-examined by Mr. Martin:

Q. How much cargo have you claimed as being lost?

A. About 375 gross tons.

Q. That is all you claim for as being lost by the overturn?

Objected to.

Q. All you claim is for the material you lost by the overturning of this boat, is it not?

[fol. 176] The Court: I will let him answer.

Q. How much are you claiming is lost?

The Court: It must show in the libel.

Mr. Martin: I don't know whether the libel states, your Honor.

A. About 375 gross tons, as I recall.

Q. And how many scows were loaded by the Port Fueling with this material at that time?

A. About six.

Q. And there was a Bouker and a Moran, two Cullens, including the one that turned over, and what about the other two?

A. There was the Willie and Annie we chartered from Harms, the Moran 48, the Maple and the 66-11.

Q. 66-11 is a Barber scow?

A. Yes. There were six in all.

Q. And they all carried their cargoes except the 32?

A. That's right.

Q. What kind of ore was this?

A. Barytes.

Q. Now, there is another similar ore called pyrites?

A. Yes.

Q. That is much heavier?

A. Personally, I don't know.

Q. It is a livelier cargo that will shift more easily, pyrites, than barytes?

A. I am not competent to say.

Q. The Port Fueling has handled a great deal of pyrites for you?

A. Yes.

Q. Loaded a number of deck scows?

A. Yes, sir.

Q. They would run up in the hundreds, wouldn't they?

A. They might.

Q. And they have loaded sulphur?

A. Yes.

[fol. 177] Q. And chalk, too?

A. Not for us.

Q. They have loaded probably in a year's time three or four hundred scows, haven't they?

A. Well, not scows, no.

Q. Well, boats of all descriptions?

A. Yes.

Q. And a great many deck scows?

A. Yes.

Q. This pyrites and barytes came on deck scows, is that correct, and sulphur?

A. Sulphur on deep boats.

Q. I don't know if I understood you correctly, Mr. Pierce. You don't say that Port Fueling hired the berth for the steamer?

A. That is my record.

Q. Now, you know nothing about the No. 32 at all, you relied on Cullen to send you a proper barge.

Objected to.

Cross examined.

By Mr. Shortridge:

Q. Did you have anyone for the Cullen people do anything to ascertain the condition of the 32 after she went under charter?

A. No, sir.

Q. There was nothing done by anyone from the Hodger Company to determine her condition or look towards her upkeep or anything while she was under charter?

A. No.

The Court: She was there only two days.

By Mr. Eggleston:

Q. You don't know of your own knowledge how much cargo was loaded on this scow, do you?

A. Not from seeing it or weighing it.

[fols. 178-317] Q. You don't know of your own knowledge, do you?

A. No.

Adjourned until 10.30 a. m. November 17, 1930.

[fol. 318] In United States District Court, Southern District of New York

Admiralty 98 138

In the Matter of the Petition of the Cullen Fuel Company, Inc., as Owner of the Deck Scow "Cullen No. 32"

Admiralty 91 392

Long Island Railroad Company; Libellant,

vs.

Cullen Fuel Company, Inc., Respondent; W. E. Heidker & Company, Inc., and Port Fuelind Corporation, Impleaded

Admiralty 93 381

Cullen Fuel Company, Inc., as Owner of Deck Scow "Cullen No. 32,"

vs.

W. E. Heidker & Company, Inc., Port Fuelind Corporation

Admiralty 87 186

W. E. Heidker & Company, Inc., as Bailee of Cargo on the "Cullen No. 32,"

vs.

Deck Scow "Cullen No. 32," Cullen Fuel Company, Inc., and Port Fuelind Corporation

On petition for limitation of liability by the Cullen Fuel Company, Inc., in respect of the capsizing of the scow Cullen No. 32, with a load of copper barytes, on August 13, 1925, in a slip between a pier under the Brooklyn Bridge, East River, and Pier 22 just north of it, the consequent loss of cargo and damage to Pier 22 and Carfloat No. 10, belonging to the Long Island Railroad Company.

[fol. 319] Messrs. Macklin, Brown, Lenahan & Speer, by J. D. Eggleston, Esq., of counsel, for the Cullen Fuel Company, Inc.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, by B. F. Shortridge, Esq., of counsel, for the Long Island Railroad Company.

Messrs. Single & Single, by T. N. Middleton, Esq., of counsel, for W. E. Hedger & Company, Inc., demise charterer of scow.

Messrs. Foley & Martin, by J. A. Martin, Esq., of counsel, for Port Fueling Company, stevedores engaged in unloading scow.

OPINION

WOOLSEY, J. (orally):

I hold the Cullen Fuel Company, Inc., liable for the accident hereinafter described; I deny its petition to limit its liability, and I hold that the claimants in that petition are entitled to their several bills of costs.

I dismiss the libel as against W. E. Hedger & Company, Inc., by the Cullen Fuel Company, Inc., with costs.

I dismiss the libel of W. E. Hedger & Company, Inc., as against the Port Fueling Corporation, with costs.

I dismiss the libel of the Long Island Railroad Company as against W. E. Hedger & Company, Inc., and Port Fueling Corporation, respondents impleaded, and the petition of Cullen Fuel Company, Inc., against them with costs to such impleaded respondents as against the Cullen Fuel Com-[fol. 320] pany, Inc., on whose petition they are made parties to this suit.

1. The parties concerned in this riverside drama are as follows:

The Cullen Fuel Company, Inc., was the owner of the Scow Cullen No. 32, whose capsizing caused the damage out of which these several suits have arisen.

W. E. Hedger & Company, Inc., was the charterer of the Scow No. 32 under the familiar harbor demise charter and had been engaged by the Grasselli Chemical Company to unload a cargo of copper barytes from the steamship Berk for which the berth on the northerly side of the Brooklyn Bridge pier had been engaged, and to transport that cargo to the Grasselli plant in New Jersey.

The Long Island Railroad Company was the lessee of Pier 22, next above the Brooklyn Bridge pier, and was the

owner of the Carfloat No. 10, which was lying at Pier 22, when the accident hereinafter described happened.

The Port Fueling Corporation is a corporation engaged hereabouts in loading and unloading cargoes and fuel and on the occasion in question, was acting as contracting stevedores engaged by Hedger & Company, the charterer of the Cullen No. 32 to unload the Berk.

II. The precedural pattern of this case which is somewhat complicated should, perhaps, have a word of mention here.

The Cullen Fuel Company, Inc., was sued by the Long Island Railroad Company in the Supreme Court of New York State for damage to its leased pier, Pier 22, East River.

The Long Island Railroad Company also sued the Cullen Fuel Company, Inc., which impleaded W. E. Hedger & Com-[fol. 321] pany, Inc., and the Port Fueling Corporation, in this Court for damage to its Carfloat No. 10. This carfloat was lying overlapping the end of Pier 22, which is somewhat shorter than the pier under the Brooklyn Bridge at which the steamship Berk was lying.

W. E. Hedger & Company, Inc., was demise charterer of the scow Cullen No. 32 of the Cullen Fuel Company, Inc., and as such was bailee of the cargo on board the scow. It has brought suit in this Court against the Scow Cullen No. 32, the Cullen Fuel Company, Inc., and the Port Fueling Corporation, seeking to cast the responsibility for the loss of the cargo of the No. 32 on the scow or on one of those respondents.

Across this network of litigation the limitation proceeding filed by the Cullen Fuel Company, Inc., as owner of the scow Cullen No. 32, was drawn, with the result that all the proceedings in which the No. 32, or the Cullen Fuel Company, Inc., were sued, or were in the position of defendant or respondent, were stayed and all claims against them for this accident were drawn into the limitation case.

The Cullen Fuel Company, Inc., not content with defensive tactics only, however, has sued W. E. Hedger & Company, Inc., as demise charterer, for damage to the Scow No. 32, and W. E. Hedger & Company, Inc., not having been active in connection with the loading and management of the scow, brought in by petition the Port Fueling Corporation as a joint respondent.

Consequently, outside of the limitation proceeding, which is the dominant proceeding before me, there still remains [fol. 322] unstayed and to be dealt with independently the libel of the Cullen Fuel Company, Inc., against W. E. Hedger & Company, Inc., the Port Fueling Corporation, impleaded, and the suit by W. E. Hedger & Company, Inc., as bailee of the cargo in so far as the Port Fueling Corporation is the respondent, and the suit of the Long Island Railroad Company against the Cullen Fuel Company, Inc., in so far as the claims against W. E. Hedger & Company, Inc., and the Port Fueling Corporation are concerned.

Therefore the opinion which I am rendering herein deals not only with the liability of the Cullen Fuel Company, Inc., for the loss hereinafter described and with its right to limit its liability therefor, but also with its right to recover for damage to the Scow No. 32 against W. E. Hedger & Company, Inc., and the Port Fueling Corporation; with the right of W. E. Hedger & Company, Inc., to recover against the Port Fueling Corporation, and the right of the Long Island Railroad Company to recover against W. E. Hedger & Company, Inc., and the Port Fueling Corporation.

III. In any matters like this it has always seemed to me highly important that the locus in que should be as clearly described as may be, and consequently I have been at some pains to get into the record the dimensions of the various vessels concerned, and also the width of the slip and the length of the piers where they were lying.

The Cullen No. 32 was a deck scow of a length of 112 feet at her deck and 90 feet at her bottom, with a 33 feet beam and with 10-foot dept- of side. She had three bulkheads, which were not watertight, running fore and aft of her, dividing her interior into substantially three equal parts.

[fol. 323] The steamship Berk is agreed to have been 345 feet long and of 54 feet beam. She was lying bow in on the north side of the Brooklyn Bridge pier with her stern considerably in from the end of that pier, which is 487 feet long.

Pier No. 22 is irregularly shaped, its downstream side, which slants slightly up the river, is 243 feet long, and the upstream side, which is at right angles to the river, is 262 feet long.

Thus it will be seen that as Pier 22 is shorter than the Brooklyn Bridge pier, there is a comparatively wide stretch of water between the end of the Brooklyn Bridge pier and the end of Pier 25, which is the next pier above Pier 22.

The width between the river ends of the Brooklyn Bridge pier and Pier 25 is 262 feet, and the width of the slip between the Brooklyn Bridge pier and Pier 22 is 150 feet at the river end. Pier 25, though it may not be of any relevance whatever, is 527 feet long.

IV. On August 12, 1925, the Cullen No. 32 had been brought down to the slip between the Brooklyn Bridge Pier and Pier 22 and had on that day loaded a part cargo at the No. 2 hatch of the steamship Berk, which assumedly would be forward of the engine room.

The No. 32 had been loaded on August 12th by the United States Trucking Company Derrick No. 2, and the evidence is that she had been loaded on an even keel with her cargo fairly distributed.

On the day of accident, August 13th, the No. 32 had been moved to the No. 3 hatch of the Berk to be further loaded, and was there loaded during the morning by the Port Fueling Corporation's Crane No. 2.

[fol. 324] The loading began on the morning of the 13th at about 8 o'clock and continued until about a quarter of twelve, when, having been advised that a tug was coming with some empty scows and would remove the Cullen No. 32 with what cargo she then had on her, and the Cullen No. 36, which was practically a sister scow and had been more fully loaded than the No. 32, work on the No. 32 was suspended.

At that time the 130 feet of space between the Brooklyn Bridge pier and Pier 22 was occupied, commencing from the north side of the Brooklyn Bridge Pier, first by the steamship Berk, 54 feet wide, then by the Port Fueling Corporation's Crane No. 2, which was substantially 35 feet wide, and then by the Cullen No. 32, which was also 33 feet wide. Thus the slip, to a width of about 120 feet was occupied by these three vessels, leaving about 30 feet of open water between the outer down river corner of Pier 22 and the starboard side of the Cullen No. 32 which was lying bow in.

There was 15 feet more—the width of the outboard end of Pier 22—between the Cullen No. 32 and the Carfloat No. 10.

I think that this substantially describes the setting for what afterwards happened.

V. Now, in a case like this it seems to me that the trier of the facts has to endeavor to find what facts are either admitted or proved without challenge, and then, take those master facts as a kind of frame for the disputed facts. He must then see whether any contentions as to the disputed facts will fit in with the master facts. If any such contention does not fit the side so contending must clearly be wrong, because one of the most important elements in any case is the element of probability based on the master facts.

[fol. 325] Now, having seen all the witnesses, the master facts which seem to me sufficient to control my disposition of these cases without attempting perhaps to make an exhaustive list of them, are—

1. That at 11.45 a. m. on August 13, 1925, the loading of the Cullen No. 32 was stopped for reasons of convenience, when she had been loaded level and just after her master had asked to have a single bucketful of ore, which would weigh about two tons, put near her after starboard corner in order to give her a slight list of an inch or so towards the dump there situated.

2. That at that time she had on board about 375 tons of copper barytes stowed quite low with the longitudinal pack of the pile substantially in the centre of the scow.

3. That this load was substantially less than the load of her sister scow, No. 36, to which nothing happened, for No. 36 had on board between 500 and 550 tons of ore and was stowed at least two or three feet higher than the No. 32.

4. That copper barytes is a cargo with a somewhat steep angle of repose; which means, that when piled it does not slide easily. The reason for this is that it has some large lumps in it and is of rather a cohesive character.

5. That when the men engaged in the work of loading the scow No. 32 returned from their luncheon, they observed that she had a noticeable list, especially at her star-

board stern. Estimates of angles are always deceptive but the estimate is that this list must then have been at that point somewhere in the neighborhood of 15 degrees.

6. The list, thus observed, slowly increased. The estimates vary, but I think I am fair in stating that it took [fol. 326] from 15 to 20 minutes before the scow turned over. During that time the water on her starboard side was encroaching and creeping forward further and further on her starboard rail until that rail was under water to a point more than two-thirds or three-quarters of its length forward.

7. As a result the inclination of the No. 32's deck towards the water got greater and greater until it had reached an angle of about 40 degrees.

8. That then the starboard side of her cargo, which as above stated, had not been piled very high and had a steep angle of repose, had reached a position which was not far off from the perpendicular so far as the starboard slope of the pile was concerned, and that, then or about then, the cargo started to slide, with the result that it tore out a part of the scow's starboard rail, tipped her over, and went overboard itself.

9. That when she tipped the Scow No. 32 slid down into the water, which is thereabouts 32 feet deep, that she slid in towards the river and then shot back, jumping out of the water so that her bow, which had been swung toward Pier 22 by the result of the forces due to torsion of this irregular submersion, shot out of the water a considerable distance and landed upside down with her bow resting partly on the piles of the adjacent Pier 22 and partly on the Long Island Railroad Company's Carfloat No. 10 which lay, as above stated, on the northerly side of Pier 22 and extended beyond the end of that pier.

The No. 32's approximate position after the accident, as I find it, is shown by the red pencil dotted lines on the [fol. 327] Long Island Exhibit C, which I think shows the situation just after the accident with substantial accuracy. Although I am not sure that it is correct in putting the Moran No. 48 near the stern of the steamship Berk, that, if an error, is immaterial.

I find, therefore, that the foregoing is the story of the accident in so far as we need it for dealing with these cases.

VI. To my mind this story points one way only, that is to the fact that either there was water—unsuspected either by the Port Fueling Corporation or by Hedger & Company—in the scow when she was delivered to be loaded alongside the Berk, or that a leak existed in her starboard after corner or near it either at her stern or her side which had not been discoveed by the casual inspection made by her owners when she was delivered under the charter and did not become operative until her submersion had gone further than it went by the partial loading of the previous day.

In any event it seems to me that after she had reached a point of submersion with 375 tons of cargo on board, either due to her instability owing to the fact that she had water already in her or else to a leak which developed in her starboard after corner or thereabouts, as above suggested, she began slowly to list in the direction of her starboard corner.

The comparative sedateness of her gradual starboard sternwise submersion could be explained in my opinion by either one of the two alternatives I have suggested.

That she was improperly loaded would be the only other explanation of the accident.

[fol. 328] Having heard all the witnesses I am satisfied that the Cullen Fuel Company, Inc., has not made out that her cargo was improperly put on her. It seems to me that if the capsizing had been due to having her cargo improperly stowed, it would have been accompanied by entirely different phenomena to those observed. If it had been due to that cause I doubt very much whether the scow would have shot across the intervening open water to the Long Island pier in the way it did, and have struck the railroad float and the pier in the way in which it struck them.

What I have said means, that the claimants in the limitation of liability case have made out a case of liability on the part of the Cullen Fuel Company, Inc.; that the Port Fueling Corporation and W. E. Hedger & Company, Inc., are not liable to the Cullen Fuel Company, Inc., for damage to the scow, or to the Long Island Railroad Company for the damage it suffered; and that the Port Fueling Corporation is not liable to W. E. Hedger & Company, Inc., for the loss of the cargo.

VII. The next point with which I must deal is the right of the Cullen Fuel Company, Inc., to limit the liability so found against it.

I think such inspection of the Cullen No. 32 as was made before she was put on the charter and was lying light, drawing perhaps 18 inches to 2 foot of water, is not sufficient to satisfy the requirements of the situation.

It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.

[fol. 329] The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers know very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her.

Apparently a report by the master of the scow of a leak found was the only basis of or the reason for any examination other than walking around inside the scow when she was light to see whether there was any leak in her bottom and whether her beams were intact.

In other words, the Cullen Fuel Company, Inc., was indulging in a precedure which may perhaps be conveniently called a hearsay inspection.

Captain Gardner, a surveyor, examined the scow whilst she was practcially in the position in which she lay just after the accident occurred, and also saw her in drydock and there made an ex post facto examination. The fact that he found good oakum in some started seams does not cover, of course, with any particularity the place where I have found that the leak must have developed,—if indeed any examination after the scow was such a mangled wreck could be deemed to have established her seaworthiness in any regard when she went out on that charter. Certainly it could not have shown proper maintenance inspection by or in behalf of her owner.

The owner of the scow was here in port; the possibility of frequent observation of the scow by it is shown. The fact is that the scow was almost continually available for examination. In such a situation I think that her owners cannot be deemed entitled to have maintained the burden

[fol. 330] of proof to limit its liability on the facts as shown here.

The cause of the damage I have found to have been unseaworthiness due to a leak which the owner ought to have discovered and would have discovered if it had made a proper inspection. Cf. In re Eastern Transportation Co., 37 Fed. (2d) 363-365; Sanberg v. Wright & Cobb Lighterage Co., 171 Fed. 449, 455.

We have thus the privity of the owner of the Cullen No. 32 with the cause of the disaster,—the casual connection between the damage and the owner's personal fault which I think is necessary to preclude limitation of liability. Cf. El Sol and The Sac City (decided November 3, 1930); The Thessaloniki, 267 Fed. 67, 70 (C. C. A. 2).

VIII. As to the findings of fact and conclusions of law in this case, I refer counsel to my decision in El Sol and The Sac City (November 3, 1930, not yet reported), and to the order entered in those cases on November 29, 1930, for my views as to the method of dealing with the requirements of the new Supreme Court Rule 46½ and the practice I purpose following if parties are unable to agree on findings of fact in accordance with any opinion which I render, or are unable to submit to me findings which are satisfactory to me.

The matter of the findings of fact and conclusions of law must be finally disposed of on or before Wednesday, December 3, 1930.

IX. When the findings of fact and conclusions of law are disposed of, appropriate decrees will have to be entered in pursuance of the foregoing opinion.

[fol. 331] These will be as follows:

1. There will be interlocutory decree denying to the Cullen Fuel Company, Inc., any limitation of liability, providing for costs in favor of the claimants and providing for a reference to a Commissioner to assess the damages as against the Cullen Fuel Company, Inc., and also providing, of course, for the continuance of the injunctions against proceeding elsewhere than in the limitation petition.

2. There will also be a final decree dismissing the libel of the Cullen Fuel Company, Inc., against W. E. Hedger & Company, Inc., the Port Fueling Corporation impleaded,

with costs to each respondent as against the Cullen Fuel Company, Inc.

3. There will be a final decree dismissing the libel of W. E. Hedger & Company, Inc., as against the Port Fueling Corporation, with costs. This libel is, of course, stayed as against the Cullen Fuel Company, Inc.

The libel of the Long Island Railroad Company is also stayed as against the Cullen Fuel Company, Inc., and it must seek its damages in the limitation proceeding. Its libel in so far as the impleaded respondents are concerned, that is, W. E. Hedger & Company, Inc., and Port Fueling Corporation, is dismissed with costs to these respondents, recoverable in the first instance against the Cullen Fuel Company, Inc., the petitioner which impleaded them, and secondarily only against the libelant.

The decrees may be settled on two days' notice.

November 18, 1930.

, United States District Judge.

[fol. 332] In United States District Court

[Title omitted]

Order as to Findings and Conclusions

The proctors for the parties in the above entitled suits being unable to agree on any findings of fact and conclusions of law in these causes,

Now, therefore, I do hereby order

1. That the opinion heretofore filed on November 18, 1930, stand as the findings of fact and conclusions of law in these [fol. 333] cases and be deemed to constitute the final decision thereof; and

2. That decrees in accordance with said opinion be served within ten days of the service of the entry of this order on proctors for the parties hereto.

Dated New York City, Jan. 3, 1931.

Woolsey, U. S. District Judge.

[fol. 334] IN UNITED STATES DISTRICT COURT

In the Matter of the Petition of CULLEN FUEL COMPANY, as Owner of the Deck Scow "Cullen No. 32," for limitation of Liability

INTERLOCUTORY DECREE Jan. 20, 1931

A libel and petition having been filed herein by Cullen Fuel Company, under the provisions of Secs. 4283 to 4285 of the Revised Statutes of the United States, and the several acts and statutes amendatory thereof and supplementary thereto, for the limitation of its liabilities for loss, destruction, damage and injury, occasioned by or resulting from, or in connection with the capsizing of the scow Cullen No. 32 on or about August 13th, 1925; and

The said Cullen Fuel Company having, pursuant to order of this Court, filed herein a stipulation for value of the said scow Cullen No. 32, in the sum of $250 for the benefit of all persons awarded damages by reason of said capsizing; and [fol. 335] This Court having issued a monition against all persons claiming damages for any loss, destruction, damage, or injury occasioned by said capsizing, requiring such persons to appear before this Court and make due proof of their respective claims before Henry E. Mattison, Esquire, a Commissioner of this Court, on or before May 1st, 1928; and

Public notice of said monition having been duly given as required by law and the practice of this Court, and said Commissioner having duly made and filed his report herein bearing date of May 1, 1928, wherein and whereby it appears that certain claims there enumerated, and no others, have been presented pursuant to said monition; and

The matter having come on to be heard by this Court, upon the petition and answers thereto of W. E. Hedger Company, Inc., and Long Island Railroad Company, and having been argued and submitted by Messrs. Macklin, Brown, Lenahan & Speer, (J. D. Eggleston, Esq., for the petitioner, Messrs. Single and Single, (Thomas H. Middleton, Esq.) for the claimant W. E. Hedger Company, Inc., and Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, (P. F. Shortridge, Esq.) for the claimant Long Island Railroad Company, and the deliberation having

been had, and the Court having rendered a decision in writing finding facts and stating conclusions of law and holding that petitioner herein is not entitled to limitation or exoneration of its liability.

Now, on motion of Single and Single, proctors for claimant, W. E. Hedger Company, Inc., it is

Ordered, adjudged, and decreed that petitioner, Cullen Fuel Company, is not entitled to exemption from liability [fol. 336] or to limitation of liability as claimed in its petition and said petition is hereby denied, and that the claimants herein have and recover of and from the petitioner, and its stipulators, their damages resulting from said capsizing of the scow Cullen No. 32 on August 13th, 1925, with interest and costs; and it is further

Ordered that the matter be referred to Horace M. Gray, Esquire, as Commissioner, to take such proofs as may be offered as to such damages of the claimants, and as to the amount of their claims filed herein and to report thereon to this Court with the evidence before him, with all convenient speed; and it is further

Ordered that all claimants who have filed claims herein do appear before the aforesaid Commissioner and make proof of their respective claims and that hearings before such Commissioner may be brought on by any party in interest by notice of four days; and it is further

Ordered that the injunction of this Court contained in the order of monition dated March 20, 1928, be and it hereby is continued in full force and effect and that the beginning or prosecution or determination of any and all claims, suits, actions or legal proceedings of any nature or description whatsoever except in the above entitled proceedings, in respect of any claim arising out of or resulting from the capsizing of the scow Cullen No. 32 on August 13th, 1925, be and they hereby are stayed and restrained until the entry of the final decree in this proceeding.

John W. Woolsey, U. S. District Judge.

[fol. 337] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Please take notice that the petitioner, Cullen Fuel Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the interlocutory decree, entered herein in the office of the Clerk of this Court on the 20th day of January, 1931.

Dated New York, N. Y., January 29, 1931.

Yours, etc., Macklin, Brown, Lenahan & Speer, Proctors for Petitioner. Office and P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

To Single and Single, Esqs., 15 William Street, New York, N. Y.; Burlingham, Veeder, Fearey, Clark & Hupper, Esqs., 27 William Street, New York, N. Y.

[fol. 338] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Cullen Fuel Company, petitioner, hereby assigns error to the interlocutory decree of this Court entered on January 20, 1931, as follows:

1. The Court erred in entering the interlocutory decree of January 20, 1931.

2. The Court erred in decreeing that the Cullen Fuel Company, the petitioner, as owner of the scow "Cullen No. 32" was not entitled to limit its liability as to any claims filed herein.

3. The Court erred in decre-*asing* that the Cullen Fuel Company, the petitioner, was not entitled to exoneration from liability of the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

4. The Court erred in failing to hold and decree that the Cullen Fuel Company was not liable in personam for the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

[fols. 339-349] 5. The Court erred in finding and decreeing that the Cullen Fuel Company, the petitioner, was liable for the claims of the Long Island Railroad Company, W. E. Hedger Company, Inc., and any other claims filed herein.

Macklin, Brown, Lenahan & Speer, Proctors for Petitioner. Office and P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

Nos. 82, 83.

Argued November 17, 1932. Decided December 12, 1932

In the Matter of the Petition of the CULLEN FUEL COMPANY, INC., as Owner of The Deck Scow Cullen No. 32, for Limitation of Liability

Appeal from the District Court of the United States for the Southern District of New York

Before L. HAND, SWAN, and CHASE, Circuit Judges

Cullen Fuel Company, Inc., has appealed from an interlocutory decree denying it exoneration or limitation of liability, and from a final decree dismissing its libel against W. E. Hedger Company, Inc., and Port Fueling Corporation, Inc., impleaded respondent. The two causes were consolidated for the purpose of appeal. Interlocutory decree modified; final decree dismissing libel affirmed.

For opinion below, see 45 F. (2d) 859.

Macklin, Brown, Lenahan & Speer, of New York City (Horace L. Cheyney, of New York City, of counsel), for appellant.

Single & Single, of New York City (Thomas H. Middleton, of New York City, of counsel), for appellee W. E. Hedger Co., Inc.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (P. Fearson Shortridge, of New York City, of counsel), for appellee Long Island R. Co.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for appellee Port Fueling Corporation.

SWAN, Circuit Judge:

In calm weather and while lying in a slip in the East River, the deck scow Cullen No. 32 careened and cast her load. In so doing the scow not only lost her cargo and damaged herself, but also did injury to Pier 22 and a carfloat belonging to Long Island Railroad Company. Liti-

gation resulted. Thereupon Cullen Fuel Company as owner of the scow filed a petition in the court below to limit its liability against the claims of Long Island Railroad Company for damage to its carfloat and pier, and the claim of W. E. Hedger Company, as bailee of the cargo. Cullen Fuel Company also filed a libel in personam against W. E. Hedger Company as demise charterer of the scow, for the damage to it. In the latter suit the charterer impleaded Port Fueling Corporation, the stevedoring corporation whose employees had loaded the scow with copper barytes discharged from a steamer berthed in the slip. The District Court found that the loading was properly done and the accident was caused by unseaworthiness of the scow. Accordingly the libel of Cullen Fuel Company and the petition impleading Port Fueling Corporation were dismissed. In the limitation proceeding limitation of liability was denied the petitioner and the cause was referred to a commissioner to take proof of the damages sustained by the two damage-claimants. From both decrees Cullen Fuel Company has appealed.

We accept the finding of fact that the scow was properly loaded. The testimony was in direct conflict on this point and the trial court's finding under such circumstances is not lightly to be upset. The court was not obliged to credit Rockenbeil's testimony that loading continued after he observed the scow's list. Indeed, his testimony is somewhat vague as to the time when he first observed it. Moreover, the argument is most persuasive that unless the scow leaked her list would not have increased as it did after the loading ceased. We think the finding is supported that the scow was leaking, or subject to leaks as the pressure of her load increased her draft, when the cargo was put on board. In other words, she was then unseaworthy. It does not necessarily follow that she was so when chartered to the Hedger Company, but that was only two days before and the scowman testified that nothing had happened to his scow during the intervening time. The owner has the burden of proving seaworthiness when the barge was delivered under her charter. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., 43 F. (2d) 700 (C. C. A. 2). We agree with the District Court that the Cullen Company has not carried that burden. Hence its libel against the Hedger Company and the petition impleading Port Fueling Company were

rightly dismissed, for the damage to the scow was not proven to have been caused by any fault on the part of the charterer or the stevedores but was due to her own unseaworthiness.

Passing now to the limitation proceeding, the question arises whether the Hedger Company as bailee of the cargo can recover for its loss upon the Cullen Company's breach of warranty of seaworthiness. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770, so decided, where the libelant, the charterer, was liable for the shipper's loss and was suing for the cargo underwriter. The present case will be controlled by that authority provided the Hedger Company is shown to be liable to the cargo owner, Grasselli Chemical Company. While it does not definitely appear what were the relations between the Hedger Company and the Grasselli Company, it was proved that the former agreed to carry the cargo for the latter and prima facie this made it liable for the loss. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., supra. The lighterage contract implies a warranty that the lighters to be furnished under it shall be seaworthy. The Loyal, 204 F. 930 (C. C. A. 2); The Jungshoved, 290 F. 733 (C. C. A. 2). If there were any express conditions in the contract which would excuse the Hedger Company as against the cargo owner, they do not appear. Hence the proof was sufficient that the charterer was liable for loss of cargo due to the scow's unseaworthiness. See The Harper No. 145, 42 F. (2d) 161 (C. C. A. 2); S. C. Loveland Co. v. Bethlehem Steel Co., 33 F. (2d) 655 (C. C. A. 3). This liability is a proper element of damage in its suit against the owner upon the latter's covenant. Pendleton v. Benner Line, supra.

There remains the question whether the Cullen Company may limit liability upon its covenant. The scow was chartered under the usual oral contract arranged by telephone. The covenant of seaworthiness is an implied covenant and the authorities are not in accord as to whether such an implied obligation is to be deemed the personal contract of the owner in such sense as to preclude limitation of liability under the doctrine declared in Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770. In this circuit it has been given the same effect as an express contract. The Loyal, supra; see The Soerstad, 257 F. 130

(D. C. S. D. N. Y.); cf. The Ice King, 261 F. 897, 899 (C. C. A. 2). The opposite view was taken in Pocomoke Guano Co. v. Eastern Transp. Co., 285 F. 7 (C. C. A. 4). See, also, Quinlan v. Pew, 56 F. 111, 119 (C. C. A. 1). Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631, actually dealt with an implied warranty, as appears from the district court's opinion (The Benjamin Noble [D. C.] 232 F. 382, 389), although the Supreme Court did not allude to this fact and apparently treated the case as governed by Pendleton v. Benner Line, supra, and Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522, where the warranties were express. See comment on these cases in The No. 34, 25 F. (2d) 602, 607 (C. C. A. 2). We adhere to our own former ruling. In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined with respect to the Hedger Company's claim. Nor need it be decided with respect to the claim of Long Island Railroad Company for reasons which will hereafter appear.

Although to the charterer the owner warranted the seaworthiness of the scow, there was no such warranty to Long Island Railroad Company. Its claim sounds only in tort, and it has the burden of establishing that the damage to its pier and carfloat was caused by negligence, though aided by a presumption arising from the scow's colliding with its stationary property. The Buffalo, 56 F. (2d) 738 (C. C. A. 2). We are dealing with a collision, and the duty of the scow owner, breach of which imposes liability to the railroad company, is not the duty to have the scow seaworthy but merely the duty not to cause damage negligently. See The Kathryn B. Guinan, 176 F. 301 (C. C. A. 2); The Jamaica, 51 F. (2d) 858, 860 (D. C. W. D. N. Y.) To hold the owner liable for this collision damage it must appear that the owner was negligent in sending out the scow, since no negligence was shown in the management of her in the slip. In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out. The proof was that Sweet made a visual examination of her seams above the light water line, and went into her hold

with a flash-light to look for leaks below the water line. No leaks were discovered. The scowman testified that she had been deep in the water with a load of brick shortly before. It is true that the seams were not proved with a trier which is admitted to be the only sure method of testing them while the vessel is light, but we cannot think that such a test must be made before each charter under penalty of a finding of negligence as against the world in sending out the boat without it. Every inference points to the belief that the leaks appeared when the scow was submerged by her load; hence we put little weight on the failure of the Cullen Company to produce records of the dry dock repairs. On the whole, we think the Cullen Company put in enough to overcome the presumption of negligence arising from the collision. This left the burden of proof resting on the railroad company, and we cannot say it has been carried. Accordingly the scow and her owner must be exonerated against the tort claims of the Long Island Railroad Company. It relies upon this court's recent decision in The Buffalo, 56 F. (2d) 738. But that turned upon the point that the presumption of negligence arising from the fact of collision had not been rebutted. While the opinion does not disclose what evidence the owner presented in attempted rebuttal, the record shows that the examination of the barge before she went out was less than that made of the Cullen No. 32, and that the bargee could not be produced to testify as to her condition then or thereafter. In the present case, as already stated, the presumption was rebutted, and we cannot say that damage to other vessels was reasonably to have been foreseen in sending out the scow without a more thorough examination than that which was made; in other words, negligence was not proved. Cases such as Taylor Bros. Lumber Co. v. Sunset Lighterage Co., 43 F. (2d) 700 (C. C. A. 2), are to be distinguished because they relate to the duty owed to the carried cargo, not to other vessels.

Final decree affirmed, and interlocutory decree modified in accordance with the foregoing opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-

rooms, in the Post Office building, in the city of New York, on the 19th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of the Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability; CULLEN FUEL COMPANY, INC., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, modified in accordance with the opinion of this court. Costs to the Cullen Fuel Company against the Long Island Company and to the Hedger Company against the Cullen Fuel Company.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Cullen Fuel Company. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1932. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms in the Post Office building, in the city of New York, on the 19th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

CULLEN FUEL COMPANY, Libellant-Appellant,

vs.

W. E. HEDGER CO., INC., Port Fueling Company,
Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cullen Fuel Company vs. W. E. Hedger Co., Inc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 19, 1932. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In the Matter of the Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deckscow "Cullen #32", for Limitation of Liability

Filed Dec. 23, 1932

The Cullen Fuel Company, petitioner, hereby moves for reargument of the above cause, for the reasons hereinafter set forth.

In the opinion filed in this Court the right of the Cullen Fuel Company to limit liability was denied under the decision of this Court in The Loyal, 204 Fed. 930, namely, that there was a personal contract made by the petitioner and the Hedger Company under which there was an im-

plied warranty of the seaworthiness of the scow, and that the petitioner, having entered into a personal contract, could not limit liability for damage to the cargo.

This question is one of general interest in the carrying trade.

It was not argued in any of the briefs presented or at oral argument, and we therefore feel impelled to ask for a rehearing in which this question may be fully briefed and argued.

In the recent decision of the Supreme Court in the Galileo (not yet reported) reference is made to the fact that a large number of the bills of lading were not signed on behalf of the carrier, but that through bills of lading had been signed by railroad companies in the West.

The decision in the present case will bring about a most anomolous result. Suppose a steamship should depart from New York with some cargo covered by bills of lading issued by the railroads in the West and other cargo shipped at New York under which bills of lading issued by the company owning the steamship.

If a loss to the cargo should occur, under the present decision the owner could limit liability for loss of cargo covered by the through bills of lading signed by the railroad companies, but could not limit liability as against loss to cargo covered by the bills of lading signed by the owner in New York City.

Certainly such an anomolous result was not contemplated by Congress in enacting the Limiting Liability Law and that anomolous result indicates that there is some fallacy in the line of reasoning which would produce such a result.

Wherein does that fallacy lie? We think it can be found in the failure, in the various reported cases, to make a clear distinction between the provisions of the Acts of 1851 and 1884.

The pertinent provisions of the Act of 1851 are as follows (U. S. Code of Laws, Title 46, Chap. 8, Secs. 182 and 183):

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board

the vessel, unless such fire is caused by the design or neglect of such owner (R. S. Section 4282).

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending (R. S. Section 4283)."

The Act of 1884 reads as follows (U. S. Code of Laws, Title 46, Chap. 8, Sec. 189):

"The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners (June 26, 1884, c. 121 Section 18, 23 Stat. 57)."

The petitioner in this case claims exemption from liability if any liability exists, under Section 4283 of the Revised Statutes.

The distinction between the two Statutes is quite clear. The Act of 1851 provides for limitation of liability only in certain specific instances.

Under Section 4282 the owner of any vessel was declared not liable for any loss or damage to cargo on board any such vessel by reason of fire, unless such fire is caused by the design or neglect of the owner.

Section 4283 of the Revised Statutes provides that the owner may only limit liability for damage to cargo on board his vessel, damage resulting from collision, etc., providing the damage occurs without his privity or knowledge.

The Act of 1884 is of an entirely different character, and provides that the individual liability of a shipowner shall be limited to the proportion of any or all debts and

liabilities that his individual share of the vessel bears to the whole.

It will be seen by an examination of all the authorities denying the right of an owner to limit liability on account of personal contracts, except possibly the Loyal, relate to claims for limitation of liability under the provisions of the Act of 1884 and not under the Act of 1851. Such confusion of thought as there may be has arisen from the fact that the cases arising under the Act of 1851 have been decided under the authority of cases relating to the Act of 1884. The provisions of the two Acts are so different that the authorities relating to limitation of liability under the Act of 1884 may have no application to the cases arising under the Act of 1851.

The propositions which we submit are that the authorities which hold that a shipowner, who claims to limit liability for debts or liabilities under the Act of 1884 cannot limit liability for losses arising out of a personal contract have no application to claims for limitation of liability for cargo losses under the Act of 1851; that the right to limit for cargo losses is governed solely by the provision of the Act of 1851; and under that act the question is not whether the owner has made a personal contract for the carriage of the goods but whether the loss to cargo has occurred without his privity or knowledge.

The Act of 1884 did not in any way amend or repeal the Act of 1851. It was merely supplementary to the Act of 1851 and extended the right to limit liability to a number of claims not included in the Act of 1851.

Such was the ruling of the Supreme Court in Richardson v. Harmon, 222 U. S. 96, where it was held that the Act of 1884 was in pari materia with the Act of 1851 and must be read in connection, with that act largely for administrative purposes, as the Act of 1884 did not carry the administrative provisions of the Act of 1851.

Pendleton v. Benner Line, 246 U. S. 353, is the usual starting point in the discussion of this question.

It will be seen by the opinion of Mr. Justice Holmes that the petitioner claimed limitation of liability only under the Act of 1884. No reference is made in the opinion to the Act of 1851. The Supreme Court held in that case that the Act of 1884 did not limit liability for the personal contracts of the vessel owner. It is said this proposition was

established by Richardson v. Harmon, 222 U. S. 96, but the remarks in the latter case were merely dicta as the question of personal contract was not involved.

In the Pendleton case, however the Court unquestionably declared that the Act of 1884 did not apply to cases where a personal contract existed.

The Decision of the Supreme Court in Pendleton v. Benner Line met wtih so much criticism both from the bench and bar that the Supreme Court was asked to review the question in Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 335, in which Mr. Justice Holmes said as follows:

"We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case, in addition to the finding of the owner's privity to the unseaworthiness, was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 149 (39 Sup. Ct. 53) (63 L. Ed. 170, 1 A. L. R. 1522)."

The decision in The Loyal, 204 Fed. 897 was rendered prior to that of the Pendleton case.

Later the question came up in The Ice King, 261 Fed. 897. That case did not involve a question of limitation for cargo loss. The question involved was the right to limit for negligence of a tugboat which was under a charter and in consequence of which an implied warranty of the seaworthiness of the tug arose. Judge Ward considered this question and after referring to the language in the Capitol Transportation Company v. Cambria Steel Company quoted above held that the law as to personal contracts did not apply to cases where there was only an implied warranty of seaworthiness and not an express warranty as there was in the Pendleton case.

It has been generally assumed by the bar that the decision of this Court in The Ice King overruled the case of The

Loyal, although no express statement to that effect is made in the opinion. That conclusion was one not only entertained by the bar but the Circuit Court of Appeals for the Fourth Circuit, in the Pocomoke Guano Co. v. Eastern Transp. Co., 285 Fed. 7, relying upon The Ice King, supra, as authority held that the rule as to personal contracts did not apply in a cargo case where the boat owner had entered into a personal contract of carriage under which there was an implied warranty of the seaworthiness of the boat.

The Court, in the present case, has gone back to the decision in The Loyal case and apparently has now overruled The Ice King case.

This Court was very much divided in the The Loyal case. Judge Noyes, who wrote the majority opinion, stated that the vessel owner is not entitled to limit his liability upon his personal contracts. In making this statement, great reliance was placed upon the decision of the Circuit Court of Appeals for the Sixth Circuit in Great Lakes Towing Co. v. Mills Transportation Co., 155 Fed. 11.

In the latter case, the contract was made by the owner of a stranded vessel for services in floating it. The efforts to float the vessel were unsuccessful.

That case was governed entirely by the Act of 1884. Under the Act of 1851, the owner of the stranded vessel who made the contract for floating it would not have been entitled to limit liability for the services rendered under that contract.

The language in the Great Lakes case from which Judge Noyes quoted, had application therefore only to the provisions of the Act of 1884 and did not in any way involve the construction of the Act of 1851 or any right of a ship owner to limit his liability under the contract under that act for damage to cargo.

In that case, the owner was not claiming to limit liability against cargo losses or other damage. It was claiming only to limit liability as to a debt, which it had personally contracted.

In The Loyal case, Judge Noyes stated as follows:

"We are unable to accept the contention that a vessel-owner, may be relieved from responsibility upon his personal contracts provided he does not break these himself.

The making of the contract is enough to place it outside of the statute."

Whether that statement is correct under the Act of 1884 is immaterial here, as we are concerned only with the construction and application of the Act of 1851.

The above quoted statement made by Judge Noyes is in direct conflict with the language of the Act of 1851 as that statute clearly makes the loss and not the contract the crucial point upon which the right of the owner to limit liability turns. The Act very clearly provides that the right to limit liability for loss of cargo depends upon the privity or knowledge of the owner of the loss and not of the contract for carriage.

This point was apparently overlooked in the opinion of Judge Noyes in The Loyal case and he erroneously relied upon a decision under the Act of 1884 which was not applicable to the question of the right to limit liability for loss of cargo without privity or knowledge of the owner under the Act of 1851.

There is another matter which has an important bearing upon this case, which is not referred to in the opinion of the Court.

The charter of the scow Cullen #32 was not made by any of the officers of the company. It was made by Sweet, who was a mere employee of the Cullen Transportation Company, the owner of the scow (fol. 168). It is true that that contract was binding upon the owner but nevertheless there was no personal contract of the owner entered into by any of its officers.

The question whether a vessel owner may limit his liability for cargo losses, if he has impliedly warranted the seaworthiness of the vessel is of much importance. The decision in The Loyal, supra, is in conflict with the decisions in other Circuits. It is desirable that the law upon a question of this character should be uniform.

It is impossible to forecast whether the Supreme Court will grant a certiorari for the purpose of having this question fully discussed and to bring about uniformity in the law.

It is to be inferred from reading Judge Lacombe's remarks in the case of The Loyal, supra, that it was his hope that the Supreme Court would grant a certiorari to get rid

of the conflict between the different circuits. An application was made to the Supreme Court for a certiorari and it was denied.

Under the limited liability law, it is possible for an owner who desires to limit liability to choose jurisdiction. For instance, in the case of loss of cargo by a vessel running between Boston and New York, it is possible for the owner to bring his suit in either jurisdiction. He, therefore, could commence a suit for limitation of liability in Boston, where he could limit liability, while he could not limit liability, under the decision of The Loyal case, if he should file his petition in New York.

In view of the importance of this question and also because it was not argued in this case, either in the briefs or orally, it is respectfully submitted that a rehearing should be granted.

Cullen Fuel Company, Petitioner, by Macklin, Brown, Lenahan & Speer, Proctors.

I, Horace L. Cheyney, counsel for the petitioner, do hereby certify that the above motion for rehearing is not made for the purpose of delay, and in my opinion, the motion for rehearing should be granted for the reasons set forth in the petition.

Horace L. Cheyney.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability

On Petition for Rehearing

Before L. Hand, Swan, and Chase, Circuit Judges

Horace L. Cheyney Esq., for the petitioner.

Per CURIAM:

Petition denied.

——, Circuit Judges.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-

rooms, in the Post Office building, in the city of New York, on the 10th day of January, one thousand nine hundred and thirty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Petition of THE CULLEN FUEL COMPANY, INC., as Owner of the Deck Scow "Cullen No. 32", for Limitation of Liability

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be, and hereby is, denied.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Cullen Fuel Company. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 10, 1933. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 368, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of In the Matter of the Petition of The Cullen Fuel Company, Inc., as owner of the deck scow "Cullen No. 32", for limitation of liability; Cullen Fuel Company, Appellant (and another case), as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of January, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 365] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 366] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed June 27, 1933

It is hereby stipulated that only the following portions of the record of the Circuit Court of Appeals for the Second Circuit now on file in this Court shall be printed for use on the argument herein and that no other portions of said record shall be printed:

	Pages
1. Statement	1
2. Petition of Cullen Fuel Company	2 to 10
3. Restraining Order	11 to 13
4. Answer of W. E. Hedger, Inc., and interrogatories	18 to 26
5. Answers to Interrogatories	27 to 29
6. Case	55 to 56
7. Testimony of Ernest D. Sweet	56 to 73
8. Testimony of Emanuel Santos	74 to 100
9. Testimony of Alphonse Avusso	100 to 111
9½. Testimony of Emanuel Santos	112 to 113
10. Testimony of Rudolph H. Sambraus	113 to 132
11. Testimony of Frank Gardner	132 to 166
11½. Testimony of Stanley W. Pierce	172 to 178
12. Opinion of Woolsey, J	318 to 331
13. Order	331 to 333
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15. Notice of Appeal	337
16. Assignments of Error	338 to 339
17. Opinion of Circuit Court of Appeals	350 to 354
18. Decree of Circuit Court of Appeals	354 to 355
19. Mandate of Circuit Court of Appeals	355 to 356
20. Motion for Rehearing	356 to 363
21. Order, Circuit Court of Appeals on Rehearing	363
22. Certificate	363 to 364
23. Copy of this stipulation, if necessary.	

Dated New York, N. Y., May —, 1933.

Horace L. Cheyney, Counsel for Cullen Fuel Company, Inc., Petitioner. Forrest E. Single, Counsel for W. E. Hedger, Inc. Chauncey I. Clark, Counsel for Long Island Railroad Co.

[fol. 369] [File endorsement omitted.]

Endorsed on cover: File No. 37,469. U. S. Circuit Court of Appeals, Second Circuit. Term No. 9. Cullen Fuel Company, Inc., owner of Deck Scow "Cullen No. 32," petitioner, vs. W. E. Hedger, Inc., bailee of cargo. Petition for a writ of certiorari and exhibit thereto. Filed March 14, 1933. File No. 9, O. T., 1933.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1932—No. [redacted] 9

CULLEN FUEL COMPANY, INC., owner of Deck Scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER, INC., bailee of cargo.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

HORACE L. CHEYNEY,
Counsel for Petitioner.

CORPORATE PRESS, INC., NEW YORK CITY

Supreme Court of the United States

OCTOBER TERM, 1932—NO. .....

CULLEN FUEL COMPANY, INC., owner of Deck Scow "CULLEN No. 32,"
Petitioner,
against
W. E. HEDGER, INC., bailee of cargo.

SUPPLEMENTAL MEMORANDUM

The brief filed in support of the petition contains errors in two respects, which escaped attention in proof reading.

The quotation from the opinion of Mr. Justice HOLMES in *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, on page 8 of the brief is erroneous.

The true citation is as follows:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

At the foot of page 6 of the brief, it is said that Judge WOOLSEY held that the boat as a fact was "seaworthy." This is erroneous and should read "unseaworthy."

HORACE L. CHEYNEY,
Counsel for Petitioner.

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Supreme Court of the United States

CULLEN FUEL COMPANY, INC., owner of Deck Scow "CULLEN NO. 32," *Petitioner*, against W. E. HEDGER, INC., bailee of cargo.	October Term, 1932. No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Cullen Fuel Company, Inc., as owner of the deck scow *Cullen No. 32*, respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to review a decision, in admiralty, of the United States Circuit Court of Appeals for the Second Circuit, which modified the decree of the United States District Court for the Southern District of New York.

The fundamental question involved in this petition is whether if a shipowner enters into a contract for carriage of goods his right to limit his liability for cargo losses is defeated because there is an implied warranty of the seaworthiness of the vessel, which is imputed to him or whether his right to limit depends solely upon the proof that the loss has occurred without his "privity or knowledge," as the statute provides, regardless of the implied warranty of seaworthiness.

The petition is prayed for because the decision of the Circuit Court of Appeals, denying the petitioner's right to limit liability for a cargo loss because of the implied war-

ranty of seaworthiness, is in direct conflict with the decisions upon the same point in other circuits; is in conflict with a recent decision of this Court and is also in conflict with the plain terms of the limited liability statute.

The Cullen Fuel Company, Inc., the petitioner, is engaged in the coal business in the City of New York, having a plant at 29th Street, East River.

It was the owner of the scow known as *Cullen No. 32.*

On August 11, 1925, the petitioner made an oral charter of its scow *No. 32,* to W. E. Hedger Co., Inc. The charter was made by telephone. Sweet, an employee of the petitioner, made the charter party on its behalf.

The charter of the scow was in the usual form which prevails in New York Harbor, whereby the scow was let to Hedger for an indefinite period and until the return of the boat to the petitioner, at a fixed daily rate of charter hire. The petitioner, as owner, furnished a man to go with the boat, commonly known as a bargee.

These charter parties have been current in New York Harbor for a number of years and have been repeatedly and uniformly held to amount to demises of the boats.

On August 11, 1925, the day the boat was chartered, Sweet, an employee of the petitioner, made an examination of it. He went down into the hold and made his examination with the aid of a flashlight and also examined the boat externally. His examination occupied about three-quarters of an hour. He testified the boat was then in sound, seaworthy condition.

On the night of the day of the charter, Hedger, the charterer, sent a tug to the plant of the petitioner at 29th Street, where the boat was then lying and that tug towed the scow to Roosevelt Street, East River.

Hedger had made a contract for the carriage of cargo of copper barytes on the steamship *Berk,* which was lying at Roosevelt Street, East River to Grasselli, N. J. The next day, August 12th, some of the cargo was discharged from

the steamship to the deck of the *No. 32*. This discharging was continued on the following day, until shortly before noon when the stevedores ceased discharging the cargo for some unknown reason. Within less than an hour thereafter, the boat capsized, dumped its cargo and rebounding, struck a wharf belonging to the Long Island Railroad Company on the opposite side of the slip, and also struck a carfloat belonging to the Long Island Railroad Company doing damage to both.

After certain suits were brought, the petitioner filed its petition in the District Court for the Southern District of New York, to limit its liability as to all claims arising out of said disaster.

Claims in said limitation proceeding were filed by W. E. Hedger Co., Inc., the charterer, as bailee of the cargo, and also by the Long Island Railroad Company, for damages to its wharf and carfloat.

The action came on for hearing before Honorable JOHN M. WOOLSEY, Judge of the District Court for the Southern District of New York, who after trial, delivered an oral opinion (R., p. 318) wherein he held that the Cullen Fuel Co., Inc., the petitioner, was liable for the accident above mentioned and denied its right to limit liability for the damages sustained by the claimants.

The trial judge held that at the time of the accident, the scow *Cullen No. 32* was unseaworthy either because it had water in it when delivered to be loaded alongside the *Berk* or that a leak existed in her starboard after corner or near it either at her stern or side. These findings of fact were purely conjectural as there was no evidence sustaining either of the findings above mentioned.

The Court held upon these conjectural findings that the scow was liable by reason of her unseaworthiness and that the petitioner, as owner of the scow, was not entitled to limit liability because the inspection made by Sweet of the scow before delivery to the charterer was insufficient and that

the petitioner should have made other and more frequent examinations of this scow.

An interlocutory decree was entered in accordance with said opinion. An appeal was taken from that decree by the petitioner to the Circuit Court of Appeals, which modified the decision of the District Court by holding that the petitioner was not liable for the claim of the Long Island Railroad Company, because it had overcome any presumption of negligence.

The Circuit Court of Appeals held that the owner was not entitled to limit liability and affirmed the decree of the Court below in that respect, but the basis of the decision of the Circuit Court of Appeals in denying the right to limit liability was entirely different from the basis of the decision of the Court below.

The decision in the District Court was in conflict with the authorities holding that the right to limit liability is defeated only where the accident occurs with the personal knowledge or privity of the owner; that in cases of corporations, the privity or knowledge must be that of one of the managing officers of the corporation; and that where a competent person is selected to look after a boat, the right of the owner to limit liability is not defeated by the negligence of the agent.

The only question which was argued in the Circuit Court of Appeals was whether the decree of the District Court below was in conflict with those authorities.

The Circuit Court of Appeals denied the right of petitioner to limit liability upon an entirely different ground, which was not raised before it in any way whatsoever and was not argued in that Court, either orally or in the briefs submitted.

The basis of the decision of the Circuit Court of Appeals denying the petitioner's right to limit is that the petitioner had made a personal contract, under which there was imputed to it an implied warranty of the seaworthiness of the

boat, in consequence of which its right to limit liability was denied. (The owner of the boat had made no personal contract with the owner of the cargo.)

The decision in the Circuit Court of Appeals in this respect is in conflict with the decision in other Circuits and is so admitted in its opinion.

Your petitioner presented a petition to the Circuit Court of Appeals asking for a rehearing so that the point upon which the Circuit Court of Appeals had rendered its opinion and which had never been argued before it, might be heard. The Circuit Court of Appeals denied this petition, notwithstanding its decision was in conflict with decisions in other circuits and the petitioner has never had its day in Court so far as concerns the ground upon which its petition of liability was denied.

CULLEN FUEL CO., INC.,
By H. L. CHEYNEY,
Counsel.

State of New York, }
County of New York, } ss.:

HORACE L. CHEYNEY, being duly affirmed, deposes and says:

That he is counsel for the petitioner, Cullen Fuel Co., Inc.; that he is familiar with the facts of this case; that he has read a copy of the transcript of record which accompanies this petition, being the transcript of record in the case at bar; that he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief; and that in his opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

HORACE L. CHEYNEY.

Affirmed to and subscribed before
me this day of March, 1933.

BRIEF IN SUPPORT OF PETITION

The Facts.

The Cullen Fuel Company, the petitioner, chartered its scow *No. 32* to W. E. Hedger & Co. The contract was an oral one made over the telephone, by Sweet, an employee of petitioner. It was in the usual form of charter existing in New York Harbor under which there was a demise of the boat to the charterer.

Under that charter, there was an implied warranty by the petitioner, as owner of the boat, to the charterer, of its seaworthiness at the time of its delivery under the charter but there was no continuing warranty of seaworthiness during the existence of the charter.

The Ice King, 261 Fed. 897;
O'Boyle v. *U. S.*, 47 Fed. (2) 585.

Hedger agreed to carry a cargo of copper barytes from the steamship *Berk* lying at Roosevelt Street, East River, N. Y. to Grasselli, N. J. Part of that cargo was loaded from the steamship by Hedger upon the petitioner's scow.

Hedger impliedly warranted the seaworthiness of the scow to the owner of the cargo, but there was no implied warranty of seaworthiness running from the petitioner, as owner of the boat, to the owner of the cargo.

The boat capsized with some cargo on board, which became a total loss.

The petitioner, as owner of the boat, filed its petition in the Southern District of New York to limit its liability for all claims arising out of this accident.

The Hedger Co. filed a claim in that proceeding, as bailee of the cargo, for the damage sustained by the cargo.

This petition came on for hearing before WOOLSEY, *J.* who held as a fact that the boat was seaworthy because of a leak

in or about the stern. That finding was purely conjectural as there was no evidence showing the existence of such a leak. The Trial Court also denied the right of the petitioner to limit liability upon the ground that an inspection made by Sweet, an employee of the petitioner, before the boat was delivered to the charterer was inadequate and incomplete and that the owner should have made other and more frequent examinations.

An appeal was taken to the Circuit Court of Appeals by the petitioner from the decree refusing its right to limit liability.

The question which was argued in that court in the briefs and orally was, if the examination of the boat made by Sweet, an employee of the petitioner was insufficient, whether the petitioner was not entitled to limit liability under those authorities which hold that the owner may limit liability if he selects a competent agent to look after the boat and to examine its condition and the disaster occurs without the owner's personal privity or knowledge.

The Circuit Court of Appeals by its opinion denied the right of the petitioner to limit liability, not upon the ground as stated by the District Court, but upon an entirely different ground which was not in any way argued before the Circuit Court of Appeals either orally or under the briefs presented.

The ground given in the opinion of the Circuit Court of Appeals for refusing the right of the petitioner to limit liability is that the petitioner impliedly warranted the seaworthiness of the boat and could not limit liability in face of that implied warranty.

It is conceded in the opinion of the Circuit Court of Appeals that its conclusion on that point is in conflict with the decisions in other circuits.

POINT I.

The decision of the Circuit Court of Appeals, holding that the petitioner could not limit liability because of the implied warranty of seaworthiness of the boat is in direct conflict with the decisions in other circuits, and it is so admitted in the opinion below.

There is no doubt of the conflict of authority on this point because it is conceded in the opinion in the present case (Record, p. 353).

In the case of *Pendleton* v. *Benner Line,* 246 U. S. 353, this Court held that the owner of a vessel could not limit liability as to cargo loss where he had made an express warranty of seaworthiness, but it has never held that the vessel owner may not limit liability where there is merely an implied warranty of seaworthiness imputed to him by law.

In *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, this Court was asked to review the decision of the *Pendleton* case.

Mr. Justice HOLMES said as follows:

> "We very much appreciate the advantage that the Act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as alleged by too literal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The decision of the Circuit Court of Appeals for the Fourth Circuit in *Pocomoke Guano Company* v. *Eastern Transportation Company,* 285 Fed. 7, is admittedly in direct conflict with the decision of the Circuit Court of Appeals in the present case, as the Circuit Court of Appeals for the Fourth Circuit held in that case that the boat owner could limit his liability for cargo loss where there was only an implied warranty of seaworthiness.

A contrary view to that stated below is also declared in *Quinlan* v. *Pew,* 56 Fed. 111 in which the First Circuit held that an implied warranty did not affect the owner's right to limit liability.

The decisions in the Second Circuit upon this point are quite contradictory.

The Circuit Court of Appeals in the present case in declaring that the petitioner was not entitled to limit liability because of the implied warranty of seaworthiness, relied upon its previous decision in the case of *The Loyal,* 204 Fed. 930. In that case the Court was very much divided. NOYES, *J.* in delivering the prevailing opinion of the Circuit Court of Appeals, denied the right of the shipowner to limit liability because of the implied warranty of seaworthiness upon the ground that the owner could not limit liability where he had made a personal contract and relied largely upon the decision of the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11.

The latter case really did not touch the question at issue because it involved a contract for the floating of a stranded ship, which was not successfully carried out.

WARD, *J.* concurred in the result but did not agree that the vessel owner was not entitled to limit liability because of a personal contract and expressed the opinion that the law was directly to the contrary and was as stated by Judge PUTNAM, in speaking for the Circuit Court of Appeals for the First Circuit in *Quinlan* v. *Pew,* 56 Fed. 111.

LACOMBE, *J.* seemed to be very much in doubt but said the question was a close one and he was inclined to concur with Judge NOYES and in view of the conflict of decisions in different circuits, expressed the hope that the question might be reviewed by this Court.

Prior to the decision in the *Loyal* case, *supra,* the Circuit Court of Appeals for the Second Circuit, had expressed an

entirely different opinion from that of Judge NOYES upon this question in the case of the *Republic*, 61 Fed. 109. In that case, WALLACE, *J.* in delivering the opinion of the Circuit Court of Appeals stated that the implied warranty of seaworthiness did not prevent the owner from limiting liability. That decision was not referred to in the opinions in the *Loyal* case.

After the decision in *The Loyal* case, the question of the effect of the implied warranty upon the right to limit liability came before the Circuit Court of Appeals for the Second Circuit in *The Ice King*, 261 Fed. 897.

In that case, there was a charter of a tug and the Court held that by reason of the implied warranty of seaworthiness of the tug, the owner was not prevented from limiting liability. In the course of the decision, the case of the *Loyal* was referred to and was not followed.

It has been generally assumed by the bar that the decision of the Circuit Court of Appeals in the *Ice King* case, *supra*, had in effect overruled its previous decisions in the *Loyal* case.

That view was not confined to the bar as the Circuit Court of Appeals for the Fourth Circuit, in the case of the *Pocomoke Guano Company* v. *Eastern Transportation Company, supra*, cited the *Ice King* case as an authority for the proposition that the implied warranty of seaworthiness did not prevent the owner from limiting liability for cargo losses.

It is desirable that the conflict of law between the different circuits upon this subject should be removed and that the law should be definitely declared by this Court.

Under this conflict of decisions, the vessel owners right to limit liability will depend upon his choice of a court in which to file his petition.

Suppose a vessel plying regularly between New York and Boston meets with disaster and a large loss occurs from damage to cargo.

The vessel owner might file his petition in New York or in Boston, as federal courts in both cities would have jurisdiction. If he should file his petition in New York, under the present decision, he could not limit liability because of the implied warranty of seaworthiness but if he should file his petition in Boston, the Court there no doubt would hold, under the decision of *Quinlan* v. *Pew, supra,* that the vessel owner could limit his liability against the same losses.

The same condition would ensue in case of a vessel running between Norfolk and New York. If the vessel owner should file his petition in New York, his right to limit liability would be denied under the present decision but if he filed his petition in Norfolk, he would be allowed to limit liability under the decision of the Fourth Circuit in *Pocomoke Guano Co.* v. *Eastern Transportation Co., supra.*

We have called attention to the fact that this question as to the right of the owner to limit liability for cargo losses by reason of the implied warranty of seaworthiness was not raised in the Circuit Court of Appeals below in any way whatsoever. It was not argued before the Court orally or in the briefs.

In view of the fact that this question was not argued before the Court in any way whatsoever, the petitioner made a motion for rehearing so that the questions could be fully and properly argued before the Court but that petition was denied and the parties have never had any hearing upon the subject whatsoever.

Whether this refusal of the Court below to hear argument upon this point amounts to a denial of due process of law is an interesting question which need not be definitely determined here.

Aside from other reasons advanced, it is submitted that a certiorari should be issued in this case, in view of the conflicting decisions, so that the parties may have an opportunity to be heard in support of their rights.

POINT II.

The decision of the Circuit Court of Appeals is in conflict with the recent decision of this Court in *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd.*, decided December 12th, 1932.

That case involved the so-called "Fire Statute" set forth in Section 4282 of the Revised Statute, U. S. C. Title 46, Section 182.

In that case there was loss of cargo by fire.

It was held that the failure of an owner to exercise due diligence to discover unseaworthiness existing at the commencement of a voyage which was the cause of the fire was not "neglect of such owner" within the Fire Statute which exonerates a vessel owner from liability for loss of cargo by fire unless such fire is caused by the design or neglect of the owner.

Mr. Justice BRANDEIS in delivering the opinion of this Court stated as follows:

> "Those cases enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness at the commencement of the voyage. The warranty is absolute that the ship is seaworthy at that time and liability does not depend upon the knowledge or ignorance, the care or neglect of the ship owner or charterer. Obviously, those cases lend no support to the contention that breach of the implied warranty of seaworthiness constitutes neglect 'of the vessel owner under the Fire Statute.'"

The petitioner here claims the right to limit liability under Section 4283 of the Revised Statute (U. S. C. Tit. 46, Sec. 183). Both the Fire Statute as set forth in Section 4282 and the limited liability provision contained in Section 4283 are part of the same statute of March 3, 1851.

The Fire Statute provides that the owner or charterer shall not be liable for any damage to cargo on board a vessel unless such a fire is "caused by the design or neglect of such owner."

Section 4283 provides that the liability of the owner of any vessel for any loss of cargo occurring "without the privity or knowledge of such owner or owners" shall in no wise exceed the amount or value of the interest of the owner in the vessel.

The two sections of the Act must be given the same construction and the statements in the opinion in *Earl & Standard* v. *Ellermans Wilson Line, Ltd.*, are equally applicable to cases where there is a claim for limitation of liability under Section 4283 of the Revised Statutes.

POINT III.

The decision of the Circuit Court of Appeals is in direct conflict with the plain words of the statute.

Under the provisions of Section 4283 of the Revised Statute, the owner of any vessel may limit his liability for losses to cargo occurring without his "privity or knowledge."

The language of this section is clear and the only question in such cases is whether the loss has occurred without the privity or knowledge of the owner.

The Circuit Court of Appeals, however, has held that the right to limit liability in such cases does not depend upon whether the loss occurs without the privity or knowledge of the owner but whether he has made a personal contract for the carriage of the goods.

There is nothing in the statute which warrants such a conclusion.

The conflict which exists in the authorities on this point is due to the fact that the provisions of the Act of Section 4283 have been confused with the provisions of the Limited

Liability Act of June 26, 1884 (U. S. C. Title 46, 189). That statute provides that the individual liability of a shipowner shall be limited to the proportion of all debts and liabilities that his individual share of the vessel bears to the whole.

The Act of 1884 has been held by this Court to be a mere supplement to the Act of 1851.

It has been held in some cases, that under the Act of 1884, the shipowner cannot limit his liability under a personal contract. But that Act has no application whatsoever to claims for limitation of liability for cargo losses which are governed solely by the Act of 1884.

The decision of the Circuit Court of Appeals in *The Loyal*, 204 Fed. 930, which the Court below has followed in the present case is based largely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Great Lakes Towing Company v. Mills Transportation Co.*, 155 Fed. 11.

In that case, the shipowner claimed limitation of liability against a contract made to pull off a vessel which was stranded. The effort was unsuccessful. The claim for limitation in that case could only have been made under provisions of the Act of 1884 and had absolutely nothing to do with the limitation as to cargo losses under the Act of 1851.

The Circuit Court of Appeals in the *Loyal* case failed to take this distinction into consideration and in fact, it gave no attention to the clear provisions of the Act of 1851, which are not referred to in the prevailing opinion.

In conclusion upon this point, we desire to call attention to the results which will follow the present decision.

Suppose the *Leviathan* departs from New York with some cargo on board shipped at New York, for which the owner has issued bills of lading and some cargo shipped from the West, for which the railroads have issued through bills of lading.

Under the present decision of the Circuit Court of Appeals, the owner of the *Leviathan* could limit liability against the loss of cargo shipped under the through railroad bills of lading but could not limit its liability for loss of cargo shipped at New York under the bills of lading signed by the owner.

Clearly, it was not contemplated that such an anomalous condition could exist.

If the provisions of Section 4283 of the Revised Statutes are properly construed the right to limit liability for cargo losses turns solely upon the question whether or not the loss occurs without the privity or knowledge of the owner, without any regard to the question whether or not such owner has made a personal contract for the transportation of the cargo, under which an implied warranty of the ship is imputed to him.

LASTLY.

It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

HORACE L. CHEYNEY,
Counsel for Petitioner.

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Supreme Court of the United States

No. 9, October Term

Cullen Fuel Company, Inc., owner of the deck scow "Cullen No. 32,"

Petitioner,

against

W. E. Hedger, Inc., bailee of cargo.

BRIEF OF CULLEN FUEL COMPANY, PETITIONER

Horace L. Cheyney,
Counsel for Petitioner.

Corporate Press, Inc., New York City

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Supreme Court of the United States

No. 9, October Term

Cullen Fuel Company, Inc., owner of the deck scow "Cullen No. 32,"
Petitioner,
against
W. E. Hedger, Inc., bailee of cargo

BRIEF OF CULLEN FUEL COMPANY, PETITIONER

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 62 Fed. (2d) 68.

The opinion of Woolsey, *J.*, in the District Court is reported in 45 Fed. (2d) 859.

Statement of Facts.

The Cullen Fuel Company, the petitioner, is a corporation engaged in the coal business in New York City and was the owner of the scow *Cullen No. 32.*

On August 11th, 1925, that scow was chartered to W. E. Hedger, Inc., of New York City.

For brevity we shall hereafter refer to the parties as Cullen and Hedger, respectively.

The charter of the scow was an oral one made over the telephone between Sweet, an employee of Cullen, and Pierce, the vice-president of Hedger.

The charter of the scow was in the usual form which prevails in New York Harbor, whereby the scow was let to Hedger for an indefinite period and until its return to Cullen, at a fixed daily rate of charter hire. Cullen, as

owner, furnished a man to go with the boat, commonly known as a bargee.

These charters have existed in New York Harbor for many years and have been repeatedly and uniformly held to be demises.

Until two or three days before the boat was chartered it had been lying at Erie Basin, for about a month, loaded with a full cargo of brick.

On August 11, 1925, the day the boat was chartered, Sweet, an employee of the petitioner, made an inspection of it. He went down into the hold and made his examination with the aid of a flashlight and he also examined the boat externally. That examination occupied about three-quarters of an hour. He testified the boat was then in sound, seaworthy condition.

On the night of the day of the charter Hedger sent a tugboat to the plant of the petitioner at East 29th Street, New York City, where the boat was then lying and that tug towed the scow to Roosevelt Street, East River, New York City.

Hedger had made a contract to carry about 3000 tons of copper barytes from the steamship *Beck*, which was lying at Roosevelt Street, to Grasselli, New Jersey.

The next day, August 12th, some of the cargo was discharged from the steamship to the deck of the *Cullen No. 32*. This loading of the cargo on the scow continued on the following morning, until shortly before noon, when the stevedores ceased loading cargo on the scow for some unknown reason.

Within less than an hour thereafter, the boat capsized, dumped its cargo and rebounding, struck a wharf belonging to the Long Island Railroad Company on the opposite side of the slip, and also struck a carfloat belonging to the Long Island Railroad Company, doing damage to both.

After certain suits were brought, the petitioner filed its petition in the District Court for the Southern District of New York, to limit its liability as to all claims arising out of said disaster.

Claims in said limitation proceeding were filed by W. E. Hedger Co., Inc., the charterer, as bailee of the cargo, and also by the Long Island Railroad Company, for damages to its wharf and carfloat.

The claim of the Long Island Railroad Company was dismissed by the Circuit Court of Appeals and that claim is not here for consideration. The only claim involved in the present proceeding is that of Hedger, as bailee of the cargo.

The Proceedings in the Courts Below.

The action came on for hearing before Honorable JOHN M. WOOLSEY, Judge of the District Court for the Southern District of New York. The trial involved a question of fact as to whether the capsizing of the scow was due to improper loading of cargo upon it or whether it was due to some unseaworthiness on the part of the scow. The Court held the cargo was properly loaded and that the *Cullen No. 32* was unseaworthy either because it had water in it when delivered alongside the *Berk* to be loaded or that a leak existed in her starboard after corner or near it at her stern or side.

These findings of fact were purely conjectural as there was no evidence in the case sustaining either one of them.

If the cargo was properly loaded of course the capsizing of the barge under the circumstances raised a presumption of unseaworthiness.

It was held in the District Court that the scow and the Cullen Fuel Company were liable for the damage to the cargo and that the Cullen Fuel Company was not entitled to limit liability for the loss.

The Court denied the right of Cullen to limit liability because it had failed to make more frequent inspections of the scow and because the unseaworthiness was due to a leak which the owner ought to have discovered if it had made a proper inspection (see Opinion, pp. 122 and 123).

An appeal was taken to the Circuit Court of Appeals for the Second Circuit by Cullen, which affirmed the decree of the Court below, but for reasons entirely different from those given in the Court below.

The Circuit Court of Appeals, in the opinion by SWAN, *J.*, denied the right of Cullen to limit liability for the loss of the cargo because there was an implied warranty of its seaworthiness by Cullen, which was to be deemed the personal contract of the owner so as to preclude limitation of liability, saying, as follows (p. 131):

> "The covenant of seaworthiness is an implied covenant and the authorities are not in accord as to whether such an implied obligation is to be deemed the personal contract of the owner in such sense as to preclude limitation of liability under the doctrine, declared in Pendleton v. Benner Line, 248 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770. In this circuit it has been given the same effect as an express contract." The Loyal, supra (204 Fed. 930).

It is said in the opinion of the Circuit Court of Appeals that the scow was unseaworthy either by reason of leaks or was unable to resist the pressure as the cargo was loaded.

That statement was purely conjectural, as there was no evidence showing the existence of either condition.

The evidence showed that after the accident the boat was in good condition, except for the injuries which it had received in the accident.

The capsizing of the boat, under the circumstances, raised a presumption of unseaworthiness, which was not overcome.

The point upon which the Circuit Court of Appeals denied the petitioner the right to limit liability was not raised in that Court in any manner whatsoever. It was not set up either in the briefs or in the oral argument.

The petitioner, therefore, having had no opportunity to present any argument on this point and having been without its day in court moved for a reargument but that motion was denied.

Summary of Argument.

1. The Circuit Court of Appeals has held in the present case that a vessel owner cannot limit liability against claims for cargo loss or damage, if he has made a personal contract which contains no express warranty of seaworthiness, because of an implied warranty of seaworthiness of the vessel which is imputed to him by law.

2. The petitioner contends that this decision is in direct conflict with the provisions of the Limited Liability Act of 1851, by which the right to limit liability depends solely upon whether the loss or damage occurs with the privity or knowledge of the vessel owner and does not depend upon whether he has made a personal contract for the carriage of the goods.

3. The decisions of the Court as to the right of the vessel owner to limit liability, where he has made a personal contract, are conflicting, but those cases which hold that the owner cannot limit liability for cargo damage where he has made a personal contract, are erroneous, as they are based upon the Act of 1884, which has no application to claims for cargo damage at all, as the right to limit liability for such claims is governed solely by the provisions of the Act of 1851.

4. Even if under the law the cargo owner cannot limit liability for damage to cargo where he has made a personal contract for its carriage, a mere implied warranty of seaworthiness does not defeat the right to limit because that so-called warranty is not part of the contract.

5. The petitioner further contends that it made no contract whatsoever for the carriage of the cargo, under which an implied warranty of seaworthiness arose, as its only contract was that with Hedger, by which the boat was chartered to the latter. While under that contract Cullen, the owner, impliedly warranted the seaworthiness of the boat to Hedger, that warranty was only as to the seaworthy condition of the boat at the time she was delivered and was not a continuing warranty.

6. The boat owner had no contract whatsoever for the carriage of the cargo and did not in any way warrant the seaworthiness of the boat to the owner of the cargo.

7. The petitioner further contends that the cases holding, under the Act of 1884, that the owner cannot limit liability where he has made a personal contract, have no application here, because no personal contract was made by the Cullen Company, that is by any of its managing officers, and that its only contract, that is for the chartering of the boat, was made by an employee.

ARGUMENT

POINT I.

The decision of the Circuit Court of Appeals denying Cullen's right to limit liability is in direct conflict with the plain provisions of the limited liability Act of 1851 and is also in conflict with the decisions in other Circuits.

The Circuit Court of Appeals for the Second Circuit has held in this case that a vessel owner, who makes a personal contract for the carriage of cargo, cannot limit his liability for damage to cargo arising from unseaworthiness of a vessel, although without his privity or knowledge, because of the implied warranty of seaworthiness of the vessel imputed to the vessel owner by law.

The decision of the Court below is far reaching and goes beyond the facts of the case.

Under that decision, if a shipowner enters into a personal contract for the carriage of goods, he cannot limit his liability against any claim for damage to cargo because the test of his right to limit his liability is whether he has made a personal contract and not whether the loss has occurred without his privity or knowledge.

The decisions of the Courts upon the question of the right of a shipowner to limit liability where he has made a personal contract, because of the imputed warranty of seaworthiness, are in great conflict.

Not only is there conflict between the decisions in different circuits but the decisions in two of the circuits are in conflict.

In this case the Circuit Court of Appeals for the Second Circuit has changed its opinion as to the law upon this subject for the third time. It has apparently overruled its last

preceding decision in *The Ice King,* 261 Fed. 897, and has gone back to its decision in *The Loyal,* 204 Fed. 930, although the decision in that case was apparently overruled in the *Ice King, supra,* and was also in conflict with the preceding decisions upon this subject.

As the question involved was not argued before the Circuit Court of Appeals in any way but was raised by the Court after argument, Cullen, the petitioner, not having had his day in Court deemed it proper to present a petition for rehearing. That petition was denied and the petitioner therefore has never had any real hearing upon this question in the Court below.

The present decision presents a most anomalous situation. Under it, if a shipowner in New York City there receives cargo and personally issues a bill of lading for it he cannot limit liability because of the personal contract. But on the other hand if the master of the vessel signs a bill of lading the owner can limit liability for cargo losses because he has made no personal contract. Furthermore if cargo is shipped on board a vessel in New York Harbor under a through bill of lading from the West the owner can still limit liability because he has made no personal contract.

It is inconceivable that Congress in passing the Limited Liability Law, ostensibly for the encouragement of American shipping, ever intended that the Act so passed by it should produce such results. This situation raises such suspicion as to the accuracy of the decision of the Court below, aside from the conflict of decisions upon the subject, as to invite careful inquiry.

In *Pendleton* v. *Benner Line,* 246 U. S. 353, the owner of a vessel entered into a charter, which did not amount to a demise, but contained an express warranty of seaworthiness. Damage to cargo occurred without the privity or knowledge of the owner, as the evidence showed that he had used due and proper diligence to make the vessel sea-

worthy. It was held by this Court, however, the opinion being by Mr. Justice HOLMES, that, under the Act of 1884, the owner was not entitled to limit liability because he had entered into a personal contract containing an express warranty of seaworthiness.

That is as far as this Court has ever gone and it has never been held by it that the vessel owner may not limit liability for cargo losses because he has made a personal contract, under which an implied warranty of the vessel is imputed to him by law.

The decision in *Pendleton v. Benner Line, supra,* brought forth a great deal of comment and this Court was asked to review the decision in that case in *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334.

It was said in the opinion in that case as follows by Mr. Justice HOLMES:

> "We very much appreciate the danger that the Act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The Circuit Court of Appeals for the Second Circuit heeding this admonition in *The Ice King,* 261 Fed. 897, held that a vessel owner who entered into a personal contract concerning the vessel, which did not contain an express warranty of seaworthiness, was not deprived of his right to limit liability because of the implied warranty of seaworthiness imputed to him by law. In that decision the Circuit Court of Appeals seems to have overruled the case of *The Loyal,* 204 Fed. 930.

The Circuit Court of Appeals in this case, apparently disregarding its preceding decision in *The Ice King* case,

supra, and the admonition of this Court in *Capitol Transportation Company* v. *Cambria Steel Company*, *supra*, has gone back to the decision in *The Loyal*, *supra*. The decision in that case was rendered by a most divided Court and the prevailing opinion rested almost entirely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Transportation Company* v. *Mills Transportation Company*, 155 Fed. 11, which as we shall show hereafter had not the slightest bearing upon the question involved.

The question naturally arises why there has been this conflict in decisions between the Courts in the various circuits and between the decisions of the Circuit Court of Appeals for the Second Circuit itself.

Probably one reason for this conflict is that there seems to have been a tendency to regard the right of the vessel owner to limit liability as an abstract question of law rather than one to be determined from the language of the statutes themselves.

Another reason for this conflict is the failure to distinguish between the language, meaning and purpose of the Limited Liability Acts of 1851 and of 1884.

Briefly, the proposition which we submit is, that in cases of cargo damage, under the Act of 1851 the question of whether the vessel owner has made a personal contract does not enter into the case, as under the plain terms of that statute the right to limit liability depends upon whether or not the loss is with the privity and knowledge of the vessel owner.

The Limited Liability Statutes.

The Act of March 3rd, 1851, contained two sections of remedial law. These were carried into the Revised Statutes as Sections 4282 and 4283.

Section 4282 of the Revised Statutes, now Section 182, Title 46, United States Code, commonly known as the "Fire Statute" reads as follows:

> "182. LOSS BY FIRE. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

That section was considered by this Court in *Earl & Stoddart* v. *Ellerman's Wilson Line,* 287 U. S. 420. It was held in that case that under this section a shipowner was relieved from liability for damage to cargo by fire, unless caused by his design or neglect, even when resulting from unseaworthiness existing at the commencement of the voyage discoverable by the exercise of ordinary care. The sole cause of the unseaworthiness was the negligence of the ship's chief engineer in putting a new supply of coal on top of old coal then heated, unknown to the owner.

In that case it was contended that, by the personal contract of the vessel owner, the fire statute was superseded. That argument was based upon the decisions of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353, and *Luckenbach* v. *McCahan Sugar Refining Company,* 248 U. S. 139. But it was held that those cases had no application as there was no personal contract waiving the provisions of the "Fire Statute."

In commenting upon the decisions in those cases it was stated in the opinion of Mr. Justice BRANDEIS as follows:

> "Moreover, the rule announced in the Pendleton and Luckenbach cases has been applied by this court only to private charter parties executed by the owner."

Section 4283 of the Revised Statutes, now Section 183 of Chapter 46, United States Code of Laws, applies directly to the present case.

It reads as follows:

> "183. LIABILITY OF OWNER NOT TO EXCEED INTEREST.—The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending (R. S. Sec. 4283)."

The language of this section is clear and unmistakable. It provides that the vessel owner may limit liability where the embezzlement, loss or destruction of the goods shipped or put on board the vessel is without the privity or knowledge of the owner. Under the plain terms of this section the question, therefore, is not whether the owner has made a personal contract for the carriage of the goods but whether the loss or damage occurs with his privity or knowledge.

The language of the section is too clear to admit of any other construction. Certainly it cannot be contended that the owner is deprived of his right to limit liability for loss of cargo arising from theft, without his privity or knowledge, because he has entered into a personal contract for the carriage of the goods.

So far as we are aware it has never been held in any case that under the provisions of the Act of 1851 the vessel owner is not entitled to limit liability where the damage or loss of cargo is without his privity or knowledge because he has entered into a personal contract for the carriage of the goods.

The decisions upon this subject have never considered the effect of the Act of 1851 at all but are all based upon the Act of 1884.

The provisions of the Act of 1851, which clearly define the conditions under which the vessel owner may limit liability for loss of cargo seem to have been very largely, if not entirely, overlooked in the decisions upon this question.

The provisions of Section 18 of the Act of June 26th, 1884, are contained in Section 189, Title 46, United States Code, read as follows:

> "189. LIMITATION OF LIABILITY OF OWNERS OF VESSELS FOR DEBTS.—The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; Provided, That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners. (June 26, 1884, c. 121, Sec. 18, 23 Stat. 57)."

The Act of 1884 did not affect in any way whatsoever the right of a vessel owner to limit liability for cargo losses under the Act of 1851.

The sole effect of the Act of 1884 was to enlarge the scope of the limitation laws and to permit the vessel owner to limit liability against claims not included within the provisions of the Act of 1851.

In *Gokey* v. *Fort,* 44 Fed. 364, ADDISON BROWN, *D. J.,* Southern District of New York, advanced the view that the Act of 1884 was designed to extend the Act of 1851 to cases of masters' acts or contracts, and thus to bring our law in harmony with the general maritime law on this subject.

The effect of the Act of 1884 was fully considered by Mr. Justice LURTON in delivering the opinion of this Court in *Richardson* v. *Harmon*, 222 U. S. 96.

In that case a steam barge, while proceeding down the Maumee River, collided with an abutment of a railway bridge, resulting in great damage to both the barge and the bridge. The owner of the barge commenced proceedings for limitation of liability. The owner of the bridge appeared and excepted to the jurisdiction of the Court on the ground that the cause of action for damage to the bridge was non-maritime in character.

The effect of the Act of 1884 was fully considered by Mr. Justice LURTON in delivering the opinion of this Court. The following conclusions were stated:

> 1. The limited liability act, as it stood before the Act of 1884, did not include the owner's individual liability for obligations ex contractu incurred without his knowledge or privity. Neither did it extend to his individual liability for non-maritime torts by the master or crew.
>
> 2. No purpose to repeal or qualify any of the terms of the existing liability law is declared in the Act of 1884, nor is this section declared, in words, to be an amendment of that law.
>
> 3. The Act of 1884 was intended to add to the enumerated claims of the old law "any and all debts and liabilities" not theretofore included in the limited liability laws.
>
> 4. The Act of 1884 is in pari materia with the Act of 1851 and must be read in connection with that law.

It was held, therefore, that the barge owner was entitled to limit liability against the claim for damage to the bridge although that claim was non-maritime in character.

The Act of 1884 not only did not repeal or affect the Act of 1851, but as declared above the Act of 1884 must be read in connection with that Act.

The Act of 1884 merely provides that the liability of a shipowner for all debts and liabilities shall be limited to the value of his individual share in the vessel. That Act contains no provision that the owner shall not be entitled to limit liability against debts or liabilities incurred by reason of his neglect of with his privity and knowledge. But as that Act must be read in connection with the Act of 1851, the vessel owner is entitled to limit liability against the class of claims included in the Act of 1884 only where they arise without his privity or knowledge.

Great Lakes Towing Company v. *Mills Transportation Company,* 155 Fed. 11 (C. C. A. 6).

In the lower Courts the authorities are in conflict upon the question of the right of the owner to limit liability where he has made a personal contract.

While that question has never been directly decided by this Court, yet in the *Capitol Transportation Company* v. *Cambria Steel Company,* 249 U. S. 334, Mr. Justice HOLMES, in commenting upon the case of *Pendleton* v. *Benner Line, supra,* in which there was an express warranty, stated as follows:

> "We are not disposed to press the law in those directions further than the cases go."

The Decisions in the Second Circuit.

The decisions of the Circuit Court of Appeals of the Second Circuit, on this subject have been like the swing of a pendulum, and, the opinion of that Court upon the subject has already changed three times.

In *The Republic*, 61 Fed. 109 (C. C. A. 2) the owners of the barge *Republic* brought proceedings for limitation of liability. The barge was used as an excursion boat for the purpose of carrying passengers. An accident happened by which a number of the passengers were killed.

The Court denied the right to limit upon the ground that the accident occurred within the privity or knowledge of the corporation owning the boat because its president, whose duty it was to inspect the boat, and who had made an inspection, had failed to make a proper inspection and by omission of proper care in his examination of the vessel, failed to discover her defective condition.

It was contended that the boat owner could not limit liability because there was the implied warranty that the barge was reasonably fit for the service for which it was chartered, that is, that she was seaworthy.

SHIPMAN, *J.*, in delivering the opinion, stated as follows:

> "The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge, and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be hard construction of the statute which would deprive the shipowner of protection under such circumstances. * * *
>
> "It was the intention of Congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore

v. Transportation Co., 20 How. 1; Walker v. Transportation Co., 3 Wall. 150; Craig v. Insurance Co., 141 U. S. 638; Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111; Hill Manufacturing Co. v. Providence & N. Y. Steamship Co, 113 Mass. 495" (pp. 112-13).

In *The Tommy,* 151 Fed. 570 the Circuit Court of Appeals in an opinion by TOWNSEND, *J.*, referred to the decision in *The Republic; supra,* with approval.

The next case in order upon this subject in the Second Circuit is that of *The Loyal,* 204 Fed. 930.

Suit was brought against the cargo on the lighter *Loyal* to recover for salvage services. The claimant of the cargo impleaded the owner of the lighter, who filed a petition for limitation of liability.

The Court held that the owner was not entitled to limit liability but was very much split up as to the reason for denying the right to limit liability. NOYES, *J.*, was of the opinion that the owner was not entitled to limit his liability upon his personal contract, which carried with it an implied warranty of seaworthiness.

In the conclusion reached, NOYES, *J.*, relied almost entirely upon the opinion of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11. We respectfully submit that the decision in the *Great Lakes Towing* case had not the slightest bearing upon the question which was at issue in the case of *The Loyal.* The right to limit liability for a cargo damage exists under the Act of 1851. The claim in the *Great Lakes Towing Company* case was for wrecking services in an unsuccessful attempt to float a stranded vessel. The Act of 1851 did not cover a claim of that kind and if any right to limit liability existed it was under the Act of 1884.

LACOMBE, *J.*, was very much in doubt in the case of the *Loyal, supra.* He said the case was a close one and that the

Circuit Court of Appeals in the First and Sixth Circuits did not seem to be in accord as to the construction of the Act of 1884. He said he was inclined to concur with Judge NOYES and expressed the hope that an effort would be made to secure a decision by this Court so as to insure future uniformity in decisions.

An application for certiorari was made to this Court and was denied.

WARD, *J.*, concurred in the result upon the ground that the owner had not proved that the boat was unseaworthy without its privity or knowledge but he did not agree that the right to limit was lost by the implied warranty of seaworthiness. He said as follows:

> "But I cannot concur in the conclusion that the petitioner is deprived of the benefit of the acts on the ground that it has personally contracted to do the lighterage business of the Apollinaris Company, the owners of the cargo, for a fixed term. The contract contained no engagement on the subject of seaworthiness at all. The law itself imposed the duty. The breach of the implied warranty of seaworthiness is a tort, a breach of duty rather than a breach of a personal contract.
>
> "If the implied warranty of seaworthiness is to be regarded as a personal contract, shipowners cannot limit their liability in case of the death of or injury to passengers at all because the law implies in the contract of carriage a duty to carry with care. Nor can they ever limit in the case of loss or damage caused by unseaworthiness to cargo carried under bills of lading, at least when signed by them as owners, as is the case with all regular steam lines. Such results would, I think, be a great surprise to all concerned."

The question next came before the Circuit Court of Appeals for the Second Circuit, in *The Ice King*, 261 Fed. 897. In that case a petition to limit liability was filed by the

owner of the tug *Ice King* against claims for damage resulting from alleged negligent towage. It was alleged that the tugboat was not properly manned and therefore was unseaworthy.

The decree of the District Court, denying right to limit liability was reversed in the Circuit Court of Appeals. In the opinion by WARD, *J.*, it is stated as follows:

> "We know of only one decision as to the implied warranty in proceedings to limit liability, and that related to a contract for the carriage of goods. *The Loyal*, 204 Fed. 930. A contract of towing represents, not the duty of an insurer, but only the duty of exercising ordinary care and skill. Assuming, however, that such an implied warranty does exist in a contract of towage: how far does it extend? Are the owners, having furnished a sufficient and competent crew, with officers duly licensed as required by law, to be held liable for such subsequent arrangements as were made in this case, and for the subsequent intoxication of the pilot while on the trip? To extend such a warranty in this way would go far to nullify the wholesome purpose of the law. We are not willing to do so, in view of the language of the Supreme Court in the latest decision on the subject (Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 335) * * *" (p. 899).

That decision impliedly overruled the decision in *The Loyal, supra*, although it is not so expressly stated.

We believe that it has been the general impression of the bar that *The Loyal* case was overruled by *The Ice King* case. It was so assumed by the Circuit Court of Appeals for the Fourth Circuit in *Pocomoke Guano Company* v. *Eastern Transportation Company*, 285 Fed. 7, which cited the *Ice King* case as an authority supporting its conclusions that the boat owner was entitled to limit liability for the damage to cargo where the boat owner made a personal con-

tract for carriage of the cargo under which there was an implied warranty of seaworthiness.

The next decision in order in the Second Circuit upon this point is the present one which, as we have heretofore stated was made without counsel for the parties having been heard upon the question and without the question ever having been raised. That Court has now gone back to *The Loyal* case. The *Ice King* case is mentioned in the opinion but was ignored, although effect of the present decision is to overrule *The Ice King* case.

The question of the right of the vessel owner to limit liability where a personal contract of carriage was made came before THACHER, *J.*, in *Cranford-Cumberland,* 1927 A. M. C. 1615 (not elsewhere reported). In that case a collision occurred between the ferryboat *Cranford* and the steamship *Cumberland.* The *Cranford* was owned and operated by the Central Railroad of New Jersey. A number of passengers on the *Cranford* were injured. They were traveling under commutation tickets which covered not only the voyage on the *Cranford* but a subsequent railway trip. It was contended the owner of the ferryboat could not limit liability because it had made a personal contract by the sale of commutation tickets to the passengers.

THACHER, *J.*, held that the owner of the ferryboat was entitled to limit liability and after distinguishing the *Pendleton, Luckenbach* and *Capitol* cases on the ground that they concerned express warranties, stated as follows:

> "Plainly the liability here involved was not thus incurred, and I can find neither reason nor authority for denying the right to limit. The warning of the Supreme Court in the Capitol Transportation Company case, supra, is not lightly to be disregarded. It was there said:
>
> 'We very much appreciate the danger that the act should be cut down from its intended effect by

> too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go.'
>
> "To adopt the claimant's contention in this case would not only press the law far beyond any decided case which has been called to my attention, but would utterly destroy the intended effect of the statute which has been so often declared."

In the opinion of the Circuit Court of Appeals in this case reference is made to the decision of LEARNED HAND, *D. J.*, in *The Soerstad*, 257 Fed. 130, in support of the conclusion reached that the petitioner was not entitled to limit liability because of a personal contract under which there was an imputed warranty of the seaworthiness of the boat.

It was there contended that the *Pendleton* and *Luckenbach* cases applied to an implied warranty. L. HAND, *J.*, carefully analyzed the nature of a warranty and stated as follows:

> "Where, however, the promise, as a promise to tow a boat, involves the future conduct of a promisor, the loss is 'done, occasioned or incurred' not by the promise and the promisee's reliance upon it, but by the failure to perform the act stipulated; and if that failure results without the knowledge or privity of the promisor, he is entitled to immunity of the statute."

It is difficult to see how that statement of the law supports the present decision in any way whatsoever.

The Decisions in the Third Circuit.

The decisions in the Third Circuit are also in conflict.

In *The City of Camden*, 292 Fed. 93, a collision occurred between two boats by reason of the steering gear of one

of them becoming unmanageable. DAVIS, *J.*, in delivering the opinion, stated as follows:

> "We proceed upon the presumption that the vessel was unseaworthy. The determination of privity or knowledge on the part of the appellees depends upon whether or not they exercised due care and caution to put and maintain the Neptune in a seaworthy condition. They might have done so, and yet the tug notwithstanding might have been seaworthy. Individuals and corporations, not expressly warranting seaworthiness of a vessel, are entitled to limitation of liability for damage done by collision resulting from conditions to which they were not privy or of which they did not have knowledge, regardless of the negligence of third persons employed by them to make examination and repairs, provided they in good faith exercised due diligence in selecting experienced, reputable, trustworthy persons. The Tommy, 151 Fed. 570, 81 C. C. A. 50; Erie Lighter No. 108 (D. C.) 250 Fed. 490; Pocomoke Guano Co. v. Eastern Transportation Co. (C. C. A.) 285 Fed. 7."

This question again came before the Circuit Court of Appeals for the Third Circuit in *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.*, 24 Fed. (2d) 410. Suit was brought for damage to cargo being carried on a lighter. The Court, however, without referring in any way to *The City of Camden* reached a conclusion directly opposite and held, under the authority of *The Loyal, supra,* that the owner was not entitled to limit liability because there was a personal contract under which there was an implied warranty to seaworthiness.

The Decision in the First Circuit.

The law in the First Circuit is opposed to that which was declared by the Second Circuit in *The Loyal* case and in the present case.

In *Quinlan* v. *Pew*, 56 Fed. 111 (C. C. A. 1), the owners of the schooner *Essex* orally chartered her to several charterers, of whom Quinlan was one. Due to a structural defect, i. e., unseaworthiness, existing prior to the departure of the vessel on her voyage, Quinlan sustained injuries. The owner sought to limit liability and Quinlan contested on the ground, among others, that the statute was not applicable because of the personal contract. The charter being oral, the warranty of seaworthiness was necessarily implied. The Court held that the statute does permit a limitation of liability notwithstanding the breach of an implied warranty of seaworthiness where there is neither privity nor knowledge. PUTNAM, *J.*, said as follows:

> "Neither can the proposition of the appellant be maintained, that the statute does not apply, because there was in this case a personal contract on the part of the owners, either express or in the form of an implied warranty, that the vessel was seaworthy. In nearly all the instances which the statute expressly enumerates as those to which the limitation of liability applies, there is necessarily an implied warranty, and frequently an express agreement in the form of a bill of lading; so that, if the contention of the complainant is correct, the wings of the statute would be effectually clipped" (p. 119).

The Decisions in the Fourth Circuit.

The law in the Fourth Circuit is also opposed to the rule as laid down by the Circuit Court of Appeals for the Second Circuit in *The Loyal* case and in the present case.

In *Pocomoke Guano Co* v. *Eastern Transportation Co.*, 285 Fed. 7 (C. C. A. 4), there was an oral hiring of a barge (without any express warranty as to seaworthiness) and the barge sank with her cargo due to structural unseaworthiness. The owner sought to limit liability and the cargo

owners contested relying on the breach of the *implied* warranty of seaworthiness. The Court said:

> "There was no express warranty in this case. An agent of the barge owner, a corporation, over the telephone contracted with a purchasing agent of the libellant to move the cargo in question from a steamer in the harbor to a nearby factory in the immediate vicinity. Nothing was signed, and no charter party entered into. Neither the corporation itself nor any of its officers signed any paper giving a warranty of any kind, or verbally did so. If from a phone message a warranty of the seaworthiness of a vessel may be implied, certainly it would not operate to create an express warranty on the part of the owner. The Ice King (C. C. A.) 261 Fed. 897" (p. 9).

The right to limit liability was granted.

In *Wessel Duval & Co.* v. *Charleston Lighterage & Transfer Co.*, 25 F. (2d) 126 (E. D. S. C.), the lighterage company orally by telephone contracted to carry a cargo of nitrate from a steamer to a wharf. The Court held that the oral contract contained an implied warranty of seaworthiness. One of the lighters sank and the Court held her unseaworthy. The right to limit liability was granted, the Court saying:

> "The case shows no express warranty by the charterer of the seaworthiness of the lighter. There was no written agreement. There were verbal conversations between Richards and Whitsitt, the president, and between Richards and Graham, the superintendent, of the petitioning corporation. These conversations were conducted over the telephone, and the services of the lighters were engaged, but nothing appears to have been said about her seaworthiness" (p. 128).
>
> "In the instant case, upon a careful examination of the record, I am constrained to find * * * that the unseaworthiness of the lighter was without the

privity or knowledge of the owner of the lighter. I think, therefore, the petitioner is entitled to limit its liability to the agreed value of the lighter" (p. 130).

Decision in the Sixth Circuit.

The cases denying the right of the owner to limit liability because of personal contract all rely largely upon the decision of the Circuit Court of Appeals for the Sixth Circuit in *Great Lakes Towing Company* v. *Mills Transportation Company,* 155 Fed. 11.

We submit that case does not have the slightest bearing upon the question which is here involved, namely, the right of a boat owner to limit his liability for cargo damage.

In that case there was a personal contract between the Mills Transportation Company and the Great Lakes Towing Company whereby the latter agreed to perform towage and wrecking services for the Mills Transportation Company, as requested. One of the steamers belonging to the transportation company stranded in Georgian Bay. The towage company dispatched a tug and wrecking outfit which attempted to float the steamer but without success. The owner of the stranded vessel commenced a proceeding to limit his liability upon this claim. In the opinion SEVERENS, *J.*, entered into a discussion of the question of the right of the vessel owner to limit liability where a personal contract exists.

We believe that case might well have been disposed of upon a different ground, that is, as the vessel was stranded and never floated, it had ceased to be a vessel within the terms of the Act and therefore the owner could not limit liability for a claim for services upon his contract.

In that case the Court merely held that under the Act of 1884 the vessel owner could not limit his liability because he had made a personal contract for the services rendered.

It was stated in the opinion of SEVERENS, *J.*, that the Act of 1884 was intended to be merely supplementary to the Act of 1851.

The decision in that case seems to have been greatly misunderstood. All that the Court held was that under the Act of 1884 a vessel owner having made a personal contract to float a stranded ship could not limit his liability as against that claim. By no stretch of imagination can that case be construed as holding, as the Court below has in this case, that a vessel owner is not entitled to limit his liability, for cargo damage, under the Act of 1851 because there is an imputed warranty of seaworthiness.

A fair criticism of the decisions which advance the proposition that the vessel owner cannot limit his liability for cargo losses where a personal contract of carriage has been made is that they have overlooked or disregarded completely the provisions of the basic statute, that of 1851, and have blindly followed the decision in the *Great Lakes* case concerning the right to limit liability for personal contract, of the character described, under the Act of 1884.

The provisions of the Act of 1851 are clear and beyond question. The test of the right to limit liability for the cargo losses is not whether the owner has made a personal contract for the carriage of the goods but whether the loss or damage is occasioned with his privity or knowledge.

The Decisions in This Court.

In order to ascertain the effect of the decisions of this Court in the *Pendleton* v. *Benner Line*, 246 U. S. 353 (which was followed in *Luckenbach* v. *McCahan Sugar Ref. Co.*, 248 U. S. 139), and in the *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, it is necessary to determine just what issues were presented to this Court in those cases by the shipowners and the decision of this Court upon those issues.

It will be seen by an examination of the reports in those cases that the contention made by the vessel owners was directly opposite to that which we are making here. It was there contended that the right of the vessel owners to limit liability was fixed by the Act of 1884 and that act repealed the Act of 1851. Our contention to the contrary, following *Richardson* v. *Harmon, supra,* is that the Act of 1884 did not repeal the Act of 1851 and that the right of the petitioner in the present case to limit liability is to be determined by the provisions of the latter act.

The precise questions which were presented to this Court in the *Pendleton* and *Capitol* cases are clearly shown by the opinion of Mr. Justice HOLMES in the latter case.

The Act of 1884 is broad and absolute in its terms. It states in unqualified language that the liability of vessel owners for all debts and liabilities incurred on account of the vessel shall not exceed the value of the vessel.

That act contains no restrictions whatsoever upon the right to limit liability, such as those in the Act of 1851, that the loss or damage shall be without the privity or knowledge of the owner.

It was believed by many that the intention of Congress, in passing the Act of 1884, was to clothe the vessel with the attributes of a corporation or of a limited partnership so that the liability of the vessel owners for all debts and liabilities incurred on account of the vessel should not exceed its value.

The vessel owners in the *Pendleton* and *Capitol* cases were endeavoring to enforce that idea and they did so by contending that the Act of 1884 repealed the Act of 1851 and the right to limit under the Act of 1884 was broad and unqualified and did not depend upon the owner's privity or knowledge.

That was the point which was presented in those cases for the consideration of the Court and that was the point which was decided by this Court.

There was no contention in those cases on behalf of the vessel owners that they were entitled to limit liability for cargo losses under the Act of 1851, for the obvious reason that such a contention would have been entirely inconsistent with the argument they were making, that the Act of 1851 was repealed by the Act of 1884, and if such a contention had been made it would have lessened the force of the argument. It seems quite apparent that the vessel owners, in those cases deliberately made no claim to limit under the Act of 1851, and the cases were presented as test ones, to procure a decision that the Act of 1884 repealed the Act of 1851.

Mr. Justice HOLMES in the *Capitol Transportation* case, *supra*, in which this Court was asked to review the *Pendleton* case, said as follows:

> "On that case the argument that the limitation of the exoneration to acts, etc., done or incurred without the privity or knowledge of the owner, was repealed by the Act of 1884, was presented in the fullest way."

It is obvious, that in the *Pendleton* and *Capitol* cases the point which was urged upon this Court was that as the Act of 1884 repealed the Act of 1851, the right to limit liability, therefore, was governed solely by the provisions of the Act of 1884 which contained no restriction whatsoever upon the right to limit the acts occurring, even with the privity or knowledge of the owner.

No other question was presented to the Court. No contention was made as to the right to limit under the Act of 1851 and all that this Court did in the *Pendleton* and *Capitol Transportation* cases was to decide the question which was presented. This Court could not, in those cases,

reach any other conclusion than it did, without overruling *Richardson* v. *Harmon, supra.*

All that this Court did in those cases was to hold that the ship owner could not under the Act of 1884 limit liability if he had made an express warranty of seaworthiness.

The Court went no further in those cases. It did not make any decision as to the rights of vessel owners to limit under the Act of 1851 as it was not called upon to do so, and apparently the shipowners did not want one.

It can hardly be seriously contended that the decisions of this Court, that a vessel owner who has made a personal contract containing an express warranty, is not entitled to limit his liability under the Act of 1884, are erroneous. But those decisions do not hold that vessel owner cannot limit liability under the Act of 1851 where there is an implied warranty of seaworthiness, as under the provisions of the latter act the right of the ship owner to limit liability for cargo losses depends upon whether the loss occurs with his privity or knowledge and not upon whether he had made a personal contract for the carriage of the goods.

In this case the evidence shows clearly and the Circuit Court of Appeals has held that the unseaworthiness or presumed unseaworthiness of the boat was without the privity or knowledge of the owner. It is said in the opinion as follows (p. 132):

> "In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out."

The decision of the Court below is in conflict with the spirit and purpose of the Limited Liability Acts.

In *La Bourgogne,* 210 U. S. 95, at page 120, Mr. Chief Justice WHITE stated as follows:

"In the Hill case, 100 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617, after summarizing the various provisions of the act of 1851, and calling attention to the rules previously adopted by this court to enforce the same, concerning the general purpose of the act the court said (p. 588):

> 'In these provisions of the statute we have sketched, in outline, a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but, if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.'"

In *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334, Mr. Justice HOLMES stated as follows (p. 336):

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The Circuit Court of Appeals for the Second Circuit has broadly decided that a vessel owner cannot limit his liability where he has made a personal contract for the carriage of the goods although the Act of 1851 provides that he shall be entitled to limit where the loss or damage occurs without privity or knowledge.

Under the rule laid down by the Circuit Court of Appeals, a shipowner cannot, if he has made a personal contract for carriage of goods, limit his liability for loss of cargo by theft of the crew or by any other person, although the Act of 1851 expressly so provides.

If the rule laid down by the Circuit Court of Appeals is correct, then it has equal application to the "Fire Statute" and no vessel owner, who enters into a personal contract for the carriage of the goods can limit his liability for loss of cargo by fire and under the rule the question would not be whether the fire occurs without the neglect or design of the owner but whether he has made a personal contract for the carriage of the goods.

Congress has passed another act which has limited the shipowner's liability for claims for damage to cargo.

We refer to the Act of February 13, 1893, Section 192, Title 46 of the U. S. Code, commonly known as the Harter Act.

Under the Third section of that Act, if the owner uses due diligence to make his vessel seaworthy, he is not responsible for loss or damage resulting from faults or errors of navigation.

If the rule which has been laid down by the Circuit Court of Appeals is sound, it would have equal application to that Act as to the Limited Liability Act of 1851.

POINT II.

Even if under the law, the boat owner cannot limit liability for damage to cargo where he has made a personal contract for its carriage a mere so-called implied warranty of seaworthiness does not defeat the right to limit because that so-called warranty is not part of the contract.

As we have heretofore stated this Court held in *Pendleton v. Benner Line*, 246 Fed. 353, that where the vessel owner by his contract enters into a personal contract whereby he expressly warrants the seaworthiness of the boat, he cannot limit liability against claims for damage to cargo under the Act of 1884.

We have also called attention to the following statement of Mr. Justice HOLMES in the *Capitol Transportation Company v. Cambria Steel Company*, 249 U. S. 334:

> "We are not disposed to press the law in those directions further than the cases go."

The decision of the Circuit Court of Appeals in this case really rests upon its previous decision in *The Loyal*, 204 Fed. 930.

NOYES, *J.*, in that case, was of the opinion that the shipowner could not limit liability because the implied warranty was a personal contract, and stated as follows:

> "The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, just as much a personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract."

WARD, *J.*, was of the opinion that the implied warranty did not prevent the owner from limiting liability and said as follows:

> "The contract contained no engagement on the subject of the seaworthiness at all. The law itself imposed the duty."

We respectfully submit that the statement made by NOYES, *J.*, was erroneous and is opposed to the basic principles of the law of contracts.

A contract is positive and not negative in its character. The contract results only where there has been a mutual understanding by the parties, or, as it is commonly expressed where there has been a meeting of the minds of the parties.

It necessarily follows that as the contract covers only those subjects upon which the minds of the parties have met, that the law cannot make a contract for the parties nor by law can a provision be inserted in a contract upon which the minds of the parties have not met and upon which they have not agreed.

Suppose "A" charters his yacht to "B" for the summer season by a written contract. Neither one has ever heard of the warranty of seaworthiness and consequently the contract of charter is silent upon that subject. How can it be said under those circumstances that "A" by contract has warranted the seaworthiness of the yacht, as the minds of the parties never met upon the subject and neither one ever had any warranty of seaworthiness in mind?

We submit the law is that where there is no express warranty under the contract, that this so-called implied warranty is not a part of the contract but is only a result or condition which follows from the relations which the parties have created by themselves by their contract.

In other words, all that the law says to the vessel owner who charters a vessel is that if he enters into a contract to charter his vessel to another, then, as a consequence of the contract he must furnish a seaworthy vessel. The law does not pretend to say that he has agreed to furnish a seaworthy vessel notwithstanding he did not agree to furnish one.

The law on this subject is in our judgment properly stated by Lord BLACKBURN, in *Steel* v. *State Line Steamship Co.*, 3 A. C. at page 86, as follows:

> "I take it, my Lords, to be quite clear, both in England and Scotland, that where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose."

Speaking with precision, there can be no implied warranty of seaworthiness. A warranty is a statement or representation of an existing fact or condition. If there is no statement in the contract of the existence of that fact or condition no warranty can exist. In other words, there can be no warranty except an express warranty, that is, where the contract itself contains the warranty.

We might refer to many instances where the parties by contract create certain relations between themselves, that the law declares that certain results follow from the creation of those relations.

Under the provisions of the Act of 1893, commonly known as the Harter Act, a shipowner is not liable for damage to cargo resulting from errors or faults in navigation provided he has used due diligence to make the vessel seaworthy. It is not necessary that the bill of lading or contract of carriage should contain a provision that the owner shall be entitled to the benefits of the Harter Act, nor does that Act become by law a part of the contract.

The shipowner becomes entitled to the benefit of the provisions of the act, because he and the cargo owner, by their contract created certain relation between themselves as bailee and bailor, or as carrier and cargo owner.

A man may employ a servant by a written contract which contains no provision that the servant, if injured in the performance of his master's work, shall receive compensation under the Workmen's Compensation Law. The Workmen's Compensation Law is not written into the contract nor has

it become a part of it. The servant becomes entitled to compensation, if injured, because of the status of master and servant created by the contract and the law applies to that status.

Two persons may enter into a written contract, creating the relation of master and servant, which expressly provides that the servant shall not be entitled to receive compensation under the Workmen's Compensation Law, for injuries received in the performance of the master's work. That provision would be invalid, as being opposed to public policy, and, the servant would be entitled to receive compensation in the event of injury notwithstanding it. But it would be futile to contend in such a case that the parties had impliedly agreed that the servant should be entitled to compensation when they had expressly agreed that the servant should not be entitled to compensation.

No case has gone further than to hold that the vessel owner cannot limit liability where he has made a personal contract. It must be admitted that even under those cases that the contract made by the master of the vessel is not a personal contract of the owner nor is one made by a mere agent or employee of the vessel owner a personal contract of the owner. Assuming for the argument that the implied warranty becomes a part of the contract, upon what ground can it possibly be contended that the owner has made a personal contract warranting the seaworthiness of the vessel when in fact he has not done so and the warranty, if one exists, is made for him by the law?

We submit in conclusion that the so-called implied warranty is a misnomer and the true rule is as stated by Lord BLACKBURN that where a vessel owner charters his vessel an obligation or duty is imposed upon him to furnish a seaworthy vessel independently of the contract and that no provision can be read into the contract by which the owner warrants the seaworthiness of the vessel, notwithstanding the fact that he has not done so in his contract.

POINT III.

The petitioner made no contract, personal or otherwise, for the carriage of the cargo.

The Circuit Court of Appeals denied the right of the petitioner to limit liability for damage to the cargo because of a personal contract although the petitioner had made no contract, personal or otherwise, for the carriage of the cargo.

The facts are as follows:

Sweet, an employee of Cullen, orally chartered the boat to Hedger under the common form of New York Harbor charter. Hedger made a contract, although the evidence is very meager, for the carriage of about 3,000 tons of copper ore on the steamship *Berk* to Grasselli, N. J.

The following consequences resulted:

The charter to Hedger was a demise whereby he became the owner *pro hac vice* of the boat.

> *Monk* v. *Cornell Steamboat Company,* 198 Fed. 472 (C. C. A. 2);
> *The Willie,* 231 Fed. 865 (C. C. A. 2);
> *Dailey* v. *Carroll,* 248 Fed. 466 (C. C. A. 2).

Cullen warranted the seaworthiness of the barge to Hedger, but that warranty was only as to the seaworthiness of the boat at the time of its delivery to the charterer and it was not a continuing one.

> *The Ice King,* 261 Fed. 897 (C. C. A. 2);
> *O'Boyle* v. *United States,* 47 Fed. (2d) 585 (C. C. A. 2).

There was no implied warranty of the seaworthiness of the boat by Cullen, its owner, to the owner of the cargo but Hedger, the charterer and carrier, did impliedly warrant

the seaworthiness of the boat to the cargo owner under the contract of carriage.

Nothwithstanding there was no contract by Cullen, the petitioner, for the carriage of the cargo, yet the boat being considered a sentient being, became liable for the proper carriage of the cargo under that line of cases which holds that in the case of a chartered vessel the vessel becomes bound for the safe carriage of the cargo upon the principle that the vessel and the cargo are mutually bound to one another.

See *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Co.*, 43 Fed. (2d) 700 (C. C. A. 2) and cases there cited.

But that liability in the case of a chartered vessel extends only to the vessel itself and the owner is not personally bound for the performance of the contract of carriage made by the charterer. *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Company, supra.*

The claim in this case was not filed in the name of the owner of the cargo but in the name of Hedger, as bailee (Record, p. 8).

Notwithstanding the fact that Cullen had no contract whatsoever for the carriage of the cargo yet the Court below has denied the right to limit liability because of a personal contract.

The Court below said that under the decision of this Court in *Pendleton* v. *Benner Line*, 246 U. S. 353, that the Hedger Company, as bailee of the cargo, can recover its loss upon the Cullen's breach of the warranty of seaworthiness (Record, p. 352).

There is a marked distinction between the *Pendleton* case and the present one. In the former case Pendleton, the owner of the schooner, made a charter to the Benner Line but that charter did not amount to a demise, while the charter in this case was a demise. There was also an ex-

press warranty of seaworthiness in that case while in the present one there was only an implied warranty of the seaworthiness of the boat running from Cullen to Hedger.

Mr. Justice HOLMES, delivering the opinion of this Court in the *Pendleton* case, stated as follows:

> "Wherever, in theory of law, the technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Edw. IV. 34, pl. 9, is an example of what has been repeated from that day to this. See Brewster v. Warner, 136 Mass. 57, 59, 49 Am. Rep. 5. Whatever may be the inadequacy, in history or theory, of the reason as applied to torts, it applies with real force to contract relations like those in this case. The whole question is hardly more than technical, as there is no doubt that this suit really represents the owners' interests, since it is brought at the request of the insurers, who have paid the loss."

It will be seen in the first instance that Mr. Justice HOLMES admitted the inadequacy of the theory of the right of a bailee to recover upon the ground of his liability over, and, in the second instance stated that in view of that inadequacy the question was hardly more than technical as the suit represented the owner's interest.

The above reasons given for permitting the bailee to recover are inconsistent. If the bailee was entitled to recover because it really represented the cargo owner's interest the right of bailee, of course, was identical with that of the owner of the cargo and he had no rights other than those possessed by the cargo owner. It is quite apparent that in a case of this kind that the cargo owner had no right of action

against Cullen upon the contract of charter party. If the claim had been filed by the cargo owner in this case unquestionably he could not have sued upon the charter party. His claim would have been against the boat only *in rem;* and Cullen would have been entitled to limit liability as he had no contract with the cargo owner.

The question arises as to which of these two inconsistent theories Mr. Justice HOLMES relied on. If the bailee merely sued on behalf of the cargo owner or its underwriters the vessel was entitled to limit liability. In order to defeat the right to limit liability, it must be held the charterer of the vessel, as bailee of the cargo, has some higher rights than the cargo owner, upon the theory that he is liable over to the cargo owner.

Mr. Justice HOLMES admitted the inadequacy of this theory as applied to torts but said they applied with real force to contract relations similar to those involved.

While it is undoubtedly true that the historical origin of the right of a bailee to sue for damage to the property in his possession under a bailment rests upon the theory of the liability of the bailee over, yet we submit that as Mr. Justice HOLMES stated that doctrine is inadequate and we submit that the more modern theory is, that the right of the bailee to recover arises out of his possession of the property, which he has a right to maintain as against the entire world, except the bailor under some conditions.

A simple instance is sufficient to show that under the modern law the bailee has a right to recover when there is no liability over on his part. Suppose two vessels are in collision, each carrying cargo, and one is solely at fault. No one would question the right of the owner of the innocent vessel as bailee of the cargo to sue the wrongdoing vessel to recover for the damages to the cargo. Under those conditions the right of the innocent ship to sue as bailee depends

solely upon the possession of the cargo and not upon liability over.

In *United States* v. *American Surety Company*, 155 Fed. 941 (SANBORN, *J.*) it was held that the United States could maintain a suit against a mail carrier and the surety on his bond conditioned that the carrier should account for all property and money coming into his possession by virtue of his position notwithstanding there was no liability on the part of the United States.

When this Court was asked in *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 335 to review the decision in the *Pendleton* case, Mr. Justice HOLMES, delivering the opinion of the Court, stated as follows:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go."

The present case is a forcible illustration of the danger mentioned by Mr. Justice HOLMES.

There is no express warranty of seaworthiness in this case as there was in the *Pendleton* case but nevertheless the Court below has denied the right of the petitioner to limit liability because it made a personal contract, notwithstanding it had never made any contract, personal or otherwise, for the carriage of the cargo and had no contractual relations whatsoever with the cargo or the owner of the cargo.

Any legal theories which will hold one for the breach of a contract, when in fact he entered into no contract whatsoever is obviously fallacious.

Hedger filed his claim merely as bailee of cargo (see answer, p. 8). He made no claim to recover on account of his liability over.

There is no evidence that he was liable over. The contract of carriage between Hedger and the cargo owner, Pierce, vice president of Hedger testified as follows (p. 109):

> "We were asked by Grasselli to arrange for the transportation, to arrange for the stevedoring and to arrange for the towing to their plant."

For all that the record shows Hedger by his contract with Grasselli might be exempt from liability for the loss of this cargo. Contracts of that kind are not uncommon.

If Hedger seeks to recover upon the theory of liability over, the burden of proof was imposed upon him and he has not met that burden as there is no evidence of liability over upon him.

POINT IV.

The boat-owner is entitled to limit liability because the contract of charter was not made by any of its managing officers but by an employee.

The contract for the chartering of the boat was made over the telephone by Sweet, an employee of the Cullen Company. Sweet described himself as superintendent of the marine department (Record, p. 16). He was not an officer of the company.

No question is raised as to his authority to make the contract.

Sambraus, the vice-president of the Cullen Company, described Sweet's position with the company as follows (pp. 73 and 74 of the Record):

"By Mr. Middleton:

Q. In your capacity as vice-president of the Cullen Company do you keep an eye on your various boats with reference to their seaworthy condition or do you leave that solely to Mr. Sweet? A. Well, up until 1929 I was very much interested because I was right at the work all the time at 29th and 30th Street and there wasn't a day that went by that I didn't see a considerable number of boats in the slip down there.

Q. Did you conceive it to be part of your duties in 1925 to inspect the boats for seaworthiness? A. Yes.

Q. Did you inspect the 32? A. No.

Q. You left that for Mr. Sweet? A. Yes, sir.

By the Court:

Q. What is he called? A. He is in charge of the captains and marine office.

Q. You call him the head of your marine department? A. Yes.

By Mr. Shortridge:

Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repairs of your boats? A. Well, sort of superintending the men, for he was continually there.

Q. Who was his immediate superior in that work? A. Myself, personally.

Q. And you were an officer of the company at that time, were you not? A. Yes, sir.

Q. Mr. Sweet was not an officer of the company? A. No, he wasn't."

The law is well settled that knowledge or privity under the Act of 1851 means the knowledge or privity, in the case of a corporation, of its managing officers.

In *Craig* v. *Continental Insurance Company*, 141 U. S. 638, Mr. Justice BLATCHFORD stated as follows:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. In Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 113 Mass. 495, 499, 500, it was said that the object of the statute was to exempt the owners of ships from the onerous liability to which they were held by the common law, as common carriers or otherwise, for the acts or neglect of their servants or agents, or of third persons, without their own knowledge or concurrence; not to diminish their responsibility for their own willful or negligent acts."

The law upon this subject is fully discussed and authorities cited in *Pocomoke Guano Co.* v. *Eastern Transp. Co.*, 285 Fed. 7 (C. C. A. 4).

WADDILL, *J.*, in delivering the opinion of the Court, stated as follows:

> "Corporations, like others, are entitled to the benefit of limitation of liability from conditions to which they are not privy, and of which they have no knowledge, and they are chargeable with knowledge of the existence of defects, or become privy to acts of negligence causing the same, only when persons representing the corporation in such capacities as to speak for the same are guilty of some negligence or omission to maintain the barge in seaworthy condition. They are likewise exempt from liability for the negligence of third persons employed to repair and put the barge in seaworthy condition, where they have, in good faith, exercised due diligence and care in the selection of such persons; that is to say, those trustworthy, experienced, and capable of performing the service, and of good reputation in the business. A few authorities bearing upon the barge's liability, under circumstances such as existed here, may be cited: Craig v. Continental Ins. Co., 141 U. S. 638, 645, 647, 12 Sup. Ct. 97, 35 L. Ed. 886; Quinlan v. Pew, 56 Fed. 111, 115, 117, 118, 5 C. C. A. 438; The Republic, 61 Fed. 109, 112, 113, 9 C. C. A. 386; The

Annie Faxon, 75 Fed. 312, 315, 21 C. C. A. 366; Van Eyken v. Erie R. R. Co. (D. C.) 117 Fed. 712; The Tommy, 151 Fed. 570, 573, 81 C. C. A. 50; Eastern Dredging Co (D. C.) 159 Fed. 541, 547; The Alola (D. C.) 228 Fed. 1006; The Richard F. Young (D. C.) 245 Fed. 503; Erie Lighter Co. No. 108 (D. C.) 250 Fed. 490, 494; People's Navigation Co. v. Toxey (C. C. A.) 269 Fed. 793."

In *The 84-H*, 296 Fed. 427, ROGERS, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, stated as follows:

"This brings us to consider the meaning of the words 'privity and knowledge' as they are found in the act under consideration. The statute withholds the right to limit liability if the shipowner had 'privity or knowledge' of the fault which occasioned the damages to be recovered. The privity or knowledge must be actual and not merely constructive. It involves a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. There must be some fault or negligence on his part or in which he in some way participates. Lord v. Goodall, etc., S. S. Co., 4 Sawy. 292, Fed. Cas. No. 8506; The Colima (C. A.) 82 Fed. 665, 679."

In *The Republic*, 61 Fed. 109, SHIPMAN, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, stated as follows:

"The English courts have always construed the acts as intending to exempt the shipowner when he himself has not been in any way to blame, and to deny him the limitation of his liability only when personal blame is attributable to him. The Warkworth, 9 Prob. Div. 20, 145; The Spirit of the Ocean, 34 Law J. Adm. 74. Undoubtedly, by our statute, as by the English statutes, the common law liability of

the shipowner is not restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore v. Transportation Co., 24 How. 1; Walker v. Transportation Co., 3 Wall. 150; Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97; Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111; Hill Manuf'g. Co. v. Providence & N. Y. Steamship Co., 113 Mass. 495."

The Circuit Court of Appeals found that the managing officers of the Cullen Company had no knowledge of the unseaworthiness of the boat. Sweet, an employee of the company, who was delegated to make an inspection of the boat, said that he found it in seaworthy condition. Even if it be held that Sweet's inspection was negligent, without the knowledge of the owner, under the authorities above cited, Cullen would still be entitled to limit liability, in the absence of any contract.

We submit that the same rule applies as to contracts, that is as the contract in this case was not made by any of the managing officers of the corporation but by Sweet, an employee, the right of the petitioner to limit liability remains unimpaired.

LASTLY.

It is respectfully submitted that the decree below should be reversed.

Respectfully submitted,

HORACE L. CHEYNEY,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1933—No. 9

CULLEN FUEL COMPANY, INC., owner of the deck scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER CO., INC., bailee of the cargo,

Respondent.

REPLY BRIEF OF PETITIONER

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CORPORATE PRESS, INC., NEW YORK CITY

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Respondent.

REPLY BRIEF OF PETITIONER

ARGUMENT

POINT I.

The privity or knowledge of the corporation, under the limited liability law, is the privity or knowledge of the managing officers of the corporation.

The privity or knowledge of a subordinate employee of a corporation is not the privity or knowledge of the corporation.

The law upon this subject has been well established for many years.

In *Craig* v. *Continental Insurance Company*, 141 U. S. 638, Mr. Justice BLATCHFORD stated as follows:

> "When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation. In Hill Mfg. Co. v. Providence & N. Y. S. S. Co., 113 Mass. 495, 499, 500, it was said that the object of the statute was to exempt the owners of ships from the onerous liability to which they

> were held by the common law, as common carriers or otherwise, for the acts or neglect of their servants or agents, or of third persons, without their own knowledge or concurrence; not to diminish their responsibility for their own willful or negligent acts."

The law as there stated has been uniformly repeatedly followed through the country, including the Second Circuit, as shown by the cases cited in our main brief.

But the Circuit Court of Appeals for the Second Circuit has recently declared that all the decisions upon this subject from *Craig* v. *Continental Insurance Company, supra,* down are erroneous and that the privity or knowledge of the most humble employee is the privity or knowledge of the corporation, and that the only acts which are not with the privity or knowledge of the owner are those contractual or tortious, of the master, crew or agent regulating the vessel who are beyond the control or supervision of the owner, that is, those who are in foreign ports.

The decision of the Circuit Court of Appeals for the Second Circuit referred to is that of *The Fred E. Hasler,* 65 Fed. (2d) 589. That decision was rendered on May 29th, 1933, after the certiorari in this case was granted.

MANTON, *C. J.,* stated as follows:

> "The purpose of the limitation of liability statute was to exempt owners, beyond the value of the vessel and freights due, from the consequences of the acts, contractual or tortious, of the master, crew, or agent regulating the vessel beyond the control or supervision of the owner. The contracts of the master or other agent on the voyage or in foreign ports bind only the ship. But the reason of that rule should forbid its application to contracts of charter hire entered into by an agent of the owner with full authority and under the immediate supervision of the owner no matter how subordinate a position the agent may occupy in the organization of the corporate owner. In most corporate enterprises, the routine of business estab-

lished by responsible officials leaves to subordinates full authority for the commission of the acts which create the corporation's contractual obligations. If the routine established gives a subordinate the authority, the corporation cannot insist that only more important officials should bind it to personal obligations. Its personal obligations should be determined by the authority of the one making the contract to transact that business and not by the importance of his official positions. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292, 63 L. Ed. 631; Sun Oil Co. Dalzell Towing Co., 55 F. (2d) 63 (C. C. A. 2), affirmed 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311; Great Lakes Towing Co. v. Mills Transp. Co., 155 F. 11, 22 L. R. A. (N. S.) 769 (C. C. A. 6)."

That decision is not only in direct conflict with every authority upon the subject, but it is unsupported by the authorities cited.

In *Pendleton* v. *Benner Line, supra,* the contract was made personally by Fields Pendleton, the owner of the vessel, and was signed by him.

In *The Capitol Transportation* case, *supra,* the contract was made by the manager of the Transportation Company.

The Sun Oil case, *supra,* did not involve limitation of liability at all and has no bearing upon the question involved.

In the *Great Lakes Towing Company* case, *supra,* the contract was made by the manager of the corporation.

In none of these cases is there the slightest suggestion of the rule which has been promulgated in *The Hasler* case. The question was not raised nor considered in any of them. It was not considered in the present case in the Circuit Court of Appeals.

The fundamental error in *The Hasler* case is that the Court has failed completely to distinguish between liability and limitation of liability, which is clearly pointed out by

Rogers, *J.*, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit in *The 84-H*, 296 Fed. 427, at page 431.

The contract of charter of the boat in this case was made by Sweet, an employee of the petitioner. No question is raised as to Sweet's authority to make that contract, but it does not follow at all that because Sweet, as an employee, had authority to make the contract that therefore the contract was a personal one of the corporation. A personal contract means more than a mere contract.

Suppose a grocer goes fishing and in his absence a customer buys from his clerk ten pounds of sugar, but the clerk, instead of giving the customer ten pounds, gives him only nine and a half pounds. Unquestionably the groceryman would be liable upon the contract made by his clerk, but by no stretch of the imagination can it be said that the grocer had made a personal contract, so as to incur a penalty for the wrongful act of his clerk.

POINT II.

The effect of the decision in the *Hasler* case, if it is to be followed, will be to largely nullify the provisions of the limited liability law.

The opinion in *The Hasler* case is open to the criticism which we have made of some of the decisions upon this subject, that is, the question of the right to limit liability has been considered an abstract proposition rather than one as dependent upon the plain language of the Acts of Congress.

The rule which is laid down in *The Hasler* case is, that in cases of cargo losses, the owner can limit liability only as against damages resulting from the acts of the agents of the corporation and of the master of the owner in a foreign port, and that the law has no application to the acts of the

employees of the corporation who are under the supervision of its managing officers.

If this rule is sound then it is obvious that the greater part of the limited liability law has been wiped out and that the vessel owner can limit liability only in a very few instances.

Probably the best test of the accuracy of an abstract proposition of law is to see how it will work upon actual application.

We, shall, therefore call attention to the application of the rule laid down in *The Hasler* case to cases of carriage of cargo, in three instances, viz.:

1. Harbor scows and lighters,
2. Steamships carrying cargo, and
3. Steamships carrying passengers.

(1) The effect of *The Hasler* decision upon harbor boats.

The Act of Congress on February 18th, 1875, Chapter 80, Section 1 of the Revised Statutes 4289, United States Code, Title 46, Section 188, provides that the limited liability laws shall apply to all seagoing vessels and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

The effect of the decision in *The Hasler* case is to nullify largely the limited liability laws, so far as concerns these harbor boats, and to cut down the right of limitation of liability within very narrow bounds.

The so-called captains or bargees of these harbor boats have none of the authority of a master of a steamer. Their duties are to attend to the eternal economy of the boat, including the pumping and the mooring, watching and looking after the lines. They have no authority whatsoever to enter into any contracts on behalf of the boat.

Dailey v. Carroll, 248 Fed. 466.

Consequently, it necessarily follows that the only persons who may make a contract for the carriage of cargo by these harbor boats are the owner and his subordinate employees. If a contract made by a subordinate employee is with the privity or knowledge of the owner and is his personal contract then, as an inevitable result, in no case can the owner of a harbor boat limit liability for cargo losses, notwithstanding that the act of 1875 says that he is entitled to limit his liability.

Under the decision in *The Hasler* case, about the only claims against which the owner of a harbor boat can limit liability are those resulting from the negligence of the bargee in attending to lines, etc., causing damage to property other than the cargo on board.

(2) If *The Hasler* decision is correct then the right of steamship owners to limit against cargo losses is largely wiped out.

In the first instance let us take the case of a vessel, engaged in the trans-Atlantic trade, lying in New York and owned by a corporation maintaining its principal office in New York City.

In these days, the master of a steamship very rarely signs a bill of lading for cargo. It is generally signed by some clerk employed by the owner of the steamship.

Under *The Hasler* case decision the owner cannot limit liability for loss to any cargo shipped under a bill of lading so signed.

Most of our steamship companies maintain offices in other cities. Suppose an agent of New York Steamship Company, in Chicago, signs the bill of lading, is that the personal contract of the steamship owner or is it not? The determination of that question might involve the consideration of many facts. We hesitate to express any opinion on the subject. If the agent of the owner in Chicago communicated with the head office in New York and received

authority to make the contract that might be the personal contract of the owner? But if he did not communicate with the head office in New York it might not be the contract of the owner.

Much cargo is received from New York for trans-Atlantic transportation under through bills of lading issued by railroad companies in the west. In that case, the law is settled that the bills of lading issued by the railroad companies are not personal contracts of the owner of the steamship.

It is so stated by Mr. Justice BRANDEIS, in delivering the opinion of this Court in *Earl & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420.

It is to be assumed from the language of the opinion in *The Hasler* decision the owner would be entitled to limit liability, where the contract of shipment is made abroad by the master or agent of the steamship company, although question might arise in those cases, if the master or agent had communicated with the owner before entering into the contract.

It seems inconceivable that Congress, in enacting the limited liability laws of 1851, so plain in its terms, ever intended to create such a muddle.

(3) The effect of *The Hasler* decision upon contracts for the carriage of passengers.

If a steamship line having an office in New York, through one of its ticket agents, sells a ticket for a trans-Atlantic voyage upon one of its steamers it cannot limit liability under *The Hasler* case.

It may be, that if the contract is made abroad the owner can limit liability.

Many passenger tickets are sold by the travel agencies. In New York City a large number are sold by those travel agencies for vessels which depart from New York. Are such contracts for transportation of passengers personal con-

tracts of the owner? Is there a distinction to be made between tickets sold by the travel agencies in New York City and elsewhere?

This question was presented in the case of *Cumberland* v. *Cranford*, 1927 A. M. C. 1615 (not reported in Federal Reporter).

In that case the ferryboat *Cranford*, belonging to the Central Railroad of New Jersey, was in collision, in the Hudson River, with the steamship *Cumberland*. A number of passengers on the *Cranford* were injured. It was held that the collision resulted from its fault.

The passengers on the ferryboat were traveling under tickets sold in the ordinary way by the ticket agents of the railroad company and those tickets covered transportation on the ferryboat from New York to New Jersey.

It was contended that the railroad company, as owner of the ferryboat could not limit liability, because it had made a personal contract by the sale of its tickets to the passengers upon the ferryboat.

THACHER, District Judge, held that the railroad company was entitled to limit its liability and said as follows:

> "To adopt the claimant's contention in this case would not only press the law far beyond any decided case which has been called to my attention, but would utterly destroy the intended effect of the statute which has been so often declared."

POINT III.

As the right to limit liability for cargo losses governed by the provisions of the Act of 1851, it is immaterial whether the contract is a personal one or not, as the sole question under the provisions of that Act, is whether the loss or damage occurs with the privity or knowledge of the owner.

We have discussed at some length in our main brief, and in the present brief the question of the effect of a personal contract of the vessel owner, as affecting his right to limit liability.

Our discussion of that question is not to be taken as the slightest admission that the personal contract for the carriage of cargo has the slightest bearing upon the right to limit liability for cargo losses, as under the Act of 1851, the sole test under that Act is whether the loss or damage occurred with the privity or knowledge of the owner.

We have discussed the cases upholding this doctrine of personal contract, because of the necessity, and not because we deem they have any bearing upon the question.

We have heretofore pointed out in our main brief that the decisions supporting this doctrine of personal contract may be due to the fact that the question has been considered as abstract propositions of law, rather than one to be determined by the plain language of the Act of 1851, and also to the fact that they are based upon the Act of 1884, which has no application to the right to limit for cargo losses.

This case involves more than the right to limit liability where there is said to be a personal contract of the owner, under which there is a so-called implied warranty of seaworthiness.

Under this doctrine of personal contract, the denial of the right to limit liability for cargo losses is not confined to

losses arising from unseaworthiness. If the doctrine of personal contract is logically carried out, the vessel owner cannot limit liability for any loss or damage whatsoever, if he has made a personal contract, no matter how that damage may arise, through collision, theft by the crew or otherwise.

The case of *Cumberland Cranford, supra,* is a logical application of this doctrine of a personal contract, because it was there contended that the owner of the ferryboat could not limit liability for injuries received by passengers on the ferryboat through collision, resulting from the negligence of the master of the boat.

Considerable time has elapsed since the Act of 1851 was passed.

Many cases concerning its application have been presented to the courts, but it is only within the few years past that there has been any suggestion of this modern doctrine of a personal contract of the shipowner, which deprives him of the right to limit liability for cargo losses. It seemed to be generally conceded for years that the right to limit liability for cargo losses depended, as the Act of 1851 expressly declares, upon whether the loss or damage resulted with the privity or knowledge of the owner.

But in the last few years we have become involved in subtleties and refinements of argument, in complete disregard of the plain provisions of the Act of 1851, in consequence of which, and notwithstanding the plain provisions of that Act, the right of the vessel owner to limit liability for damage to cargo has been largely cut down. If these more recent decisions, for instance, *The Hasler* case, are sound, we have the most extraordinary conditions resulting, which we have set forth above.

It is beyond belief that Congress, in passing the Act of 1851, ever dreamed that such a construction would be placed upon the plain terms of that Act, so as to create such a muddled condition as now exists under some of the decisions.

The terms of the Act of 1851 are clear and we are now asking the Court to wipe out these conflicting and troublesome decisions, which are in plain conflict with the provisions of that Act, and to declare the rights of the vessel owners to limit liability are to be determined by the plain provisions of the Act of 1851, under which the question is not whether the contract of shipment of carriage is a personal one, but whether the loss results with the privity or knowledge of the owner.

Some of the decisions under the limited liability laws seem to reflect opposition to the whole scheme of those laws.

The decision in this case, and in *The Hasler* case, so at variance with the plain terms of the statutes, indicate that such opposition may have played considerable part in the results which were reached.

But the question of the economic policy underlying the limited liability laws is not a judicial question, at all, but is a political one, lying solely within the province of Congress.

It has always been declared by this Court that these statutes were enacted for the encouragement of our mercantile marine and are to be construed accordingly, instead of being whittled away by subtleties and refinements of argument.

In our main brief we have called attention to the statement by Mr. Justice HOLMES in the *Capitol Transportation Company* v. *Cambria Steel Company*, 249 U. S. 334. He there spoke of the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of the owners or by too liberal an attribution of contracts as personally theirs.

It is difficult to comprehend the reason for objection to the limited liability laws. The general purpose of those laws is the same as that of the modern business corporation laws, although the limited liability laws are not so broad as the latter.

At the time the Act of 1851 was passed there were very few business corporations and Congress, in enacting the Act of 1851, was only anticipating the now generally prevalent business corporation laws.

There seems to be no objection to these business corporation laws but for some reason the objection to the scheme of the limited liability laws still continues without any apparent reason.

In *Flink* v. *Paladini*, 279 U. S. 59, Mr. Justice HOLMES said that the purpose of the Act of Congress was "to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise." Modern corporation business laws have the same purpose.

POINT IV.

If the right of a bailee to recover for damage to his cargo rests upon the right of possession, any right or action by the bailee sounds in tort and not upon a contract.

In our original brief we have argued that the right of a bailee to sue for damage to a bailed article rests upon his right of possession, rather than upon his liability over.

The respondent says that we have not pointed out any difference which would follow. It is true that we overlooked, in our main brief, pointing out the distinction which would result, but that distinction is obvious.

The right of a bailee to sue for damage to the bailed article in his possession rests solely upon the wrong or tort committed. If the bailed article is damaged he may maintain an action in the case or if his possession has been disturbed he may bring an action in trover, replevin or detinue.

See *Corpus Juris*, Vol. 6, page 1167, and authorities there cited.

But in the present case the respondent, as bailee is seeking to recover under a contract, not for the carriage of cargo, but for the charter of the boat. The Circuit Court of Appeals has held that he is entitled to recover because of the so-called implied warranty of seaworthiness, which is said to be a part of the contract under which the boat was chartered by the petitioner to the respondent.

The respondent cannot sue as bailee for breach of that contract. His only right of suit, on his own behalf, is for breach of the charter party. That contract is no part of the contract of carriage between the respondent and the owner of the cargo, whose rights apparently the respondent is attempting to enforce in the present case.

POINT V.

The petitioner is not debarred from limiting liability for the reasons set forth in the opinion in the District Court.

In the District Court, WOOLSEY, *J.*, denied the right of the petitioner to limit liability upon certain grounds.

The Circuit Court of Appeals has held that the petitioner could not limit liability, but upon grounds entirely different from those announced in the District Court.

The certiorari was granted in this case by reason of the conflict between the decision of the Circuit Court of Appeals and the decisions of other courts upon certain legal questions.

The respondent, however, now claims that he is entitled to have this Court determine whether or not the petitioner can limit liability because of the reason set forth in the opinion of the District Judge, although no certiorari has been presented by the respondent to review the decision of the Circuit Court of Appeals upon that ground.

Although no certiorari was applied for by the respondent in this case to raise the question which is now presented, we

assume that this Court may examine the whole case, including the opinion of the District Judge if it so desires.

In view of the fact that the consideration of the opinion of the District Court will require considerable examination of the facts of the case, while the certiorari was granted to determine certain questions of law, it is to be assumed that this Court will be reluctant to hear any extended discussion of the facts of the case.

It is stated in the respondent's brief (p. 9) that "both courts below have found that the scow *Cullen No. 32* was unseaworthy at the time she went under charter to respondent. Petitioner does not now question these findings of fact."

The above statement is quite erroneous, as will appear by our main brief, where we stated that we would admit for the purpose of this case that a presumption of unseaworthiness arose which had not been overcome by the petitioner.

The distinction would be quite unimportant if the respondent were not now raising the question that petitioner cannot limit liability under the decision of the District Court.

WOOLSEY, *J.*, found as a fact that the boat was unseaworthy for one of two reasons: (1) that there was water in the scow when she was delivered to be loaded alongside the steamship *Berk* unknown to Hedger or the stevedore, or, (2) that a leak existed in her starboard after corner or near it either at her stern or her side (Record, p. 121).

Later in his opinion he seemed to eliminate the first ground of unseaworthiness stated above and to hold that the boat was unseaworthy because of a leak in her after corner.

There is not the slightest evidence in the case justifying or supporting these findings of fact in the District Court. There is no evidence whatsoever that there was any water in the boat or that there was a leak in or about her after corner.

There was an issue of fact in the case as to whether the cargo was properly loaded, but after the Court found that

the cargo was improperly loaded, as the scow careened without any evident cause, there was a presumption of unseaworthiness. That we admit and no more.

In the opinion of SWAN, *J.*, in the Circuit Court of Appeals it is said that unless the scow leaked her list would not have increased as it did after the loading and that "we think that the finding is supported that the scow was leaky, or subject to leaks, as the pressure of her load increased her draft when the cargo was put on board" (fol. 351).

The statement there made that the boat became subject to leaks as the pressure of her load increased her draft was unsupported by any evidence and was pure conjecture on the part of the Court. In fact it seems to be in direct opposition to the evidence. At the time the boat careened she had only about 375 tons on board, although her carrying capacity was 550 to 600 tons, and until a few days before she had been lying loaded with a full cargo of brick.

These findings of fact were not unsupported by the evidence but were unnecessary because as we frankly admit the careening of the barge under the circumstances raised a presumption of unseaworthiness and we are also willing to admit for the purpose of this case that that presumption was not overcome by the petitioner, although it is somewhat difficult to reconcile such a conclusion with the conclusion of the District Court in reference to claim of the Long Island Railroad Company for damage to its wharf and carfloat. So far as concerns that claim the Court held that the careening of the barge raised a presumption of negligence, under the rule of *res ipsa loquitur*, but that the petitioner had overcome that proof by its evidence. It is somewhat difficult to understand why, if the evidence was sufficient to overcome the presumption of negligence so far as one claim is concerned, it was not sufficient to overcome the presumption of unseaworthiness on the other hand.

Both the Circuit Court of Appeals and the District Court seemed to think it necessary to find the exact cause of the alleged unseaworthiness of the boat, although there was no evidence of actual unseaworthiness, whatsoever. Accidents of this kind sometimes happen which defy discovery as to the cause.

In the *Kathryn B. Guinan,* 176 U. S. 301. The boat cut capers somewhat similar to those in the present case.

HOUGH, *J.*, in the District Court, stated as follows:

> "Such vessels do occasionally and unaccountably spring leaks and suddenly sink, this accident must be relegated to that small but real class."

In the Circuit Court of Appeals, Second Circuit, WARD, *J.*, stated as follows:

> "Such extraordinary behavior was hardly to be looked for, and yet something like it has occurred before, as may be seen from the cases of A Scow Without a Name, 7 Ben. 384, Fed. Cas. No. 12,554; and The On The Level (D. C.), 128 Fed. 511."

The respondent in an effort to sustain the finding of the District Court makes the following statement in its brief (p. 35):

> "The rule is well settled that the failure to conduct a proper and sufficient examination of a vessel before loading cargo upon her, or before letting her under charter, is sufficient to render her owner in 'privity or knowledge' of her unseaworthy condition, if cargo sustains damage through the vessel's unseaworthiness."

If such a rule exists it is real news to the admiralty bar. Frankly we never heard of it and we emphatically deny the existence of any rule of law of that kind.

The error in that statement is due to confusion on the part of respondent as to the provisions of the Harter Act and of the Limited Liability Law.

Under the provisions of the Harter Act the vessel owner is not liable for losses to cargo, resulting from errors in managing and navigation, etc., provided he has used due diligence to make the vessel seaworthy. Under the limited liability law no such rule prevails but the right to limit liability depends upon whether the unseaworthiness is with the privity of knowledge of the owners. The two acts have no connection whatsoever. The Harter Act affects the preliminary question of liability and the Limited Liability Laws are concerned only with the liability when established.

The distinction between the two acts and the lack of connection between them is clearly pointed out in the opinion of SWAN, *J.*, in *The Galileo*, 54 Fed. (2d) 913.

The respondent attempts to support this above alleged rule of law by quoting only partially, and in, such way as to cause misunderstanding, from the remarks of Mr. Justice STONE in *The Malcolm Baxter, Jr.* (*France* v. *French Overseas Corp.*, 277 U. S. 323).

Not only is the quotation in respondent's brief (p. 35) as to the language of Mr. Justice STONE misleading, but the respondent falls into further error by stating it was there held by this Court that the alleged rule above mentioned existed. As a fact, Mr. Justice STONE after referring to the decision of the Courts below said: "The correctness of this determination is not raised on the petition here."

What Mr. Justice STONE actually said in that case was as follows:

> "Both courts below agreed that the Baxter was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability

> under the Harter Act, Act of February 13, 1893, chap. 105, 27 Stat. at L. 445, U. S. C. title 46, Sec. 190, and acts permitting limitation of liability to the vessel and pending freight. Rev. Stat. Sections 4282-4289, U. S. C. title 46, Sections 182-188. The correctness of this determination is not raised on the petition here."

The above remarks of Mr. Justice STONE under the circumstances were but dictum, but it is impossible to read them as stating that the vessel owner cannot limit liability if he has failed to use due diligence to make the vessel seaworthy. It is quite apparent from the context of the above remarks of Mr. Justice STONE that what he said was that the vessel owner was not entitled to exoneration under the Harter Act because he had failed to use due diligence and that furthermore he was not entitled to limit liability under the Limited Liability Laws.

In *Earl & Stoddart* v. *Ellermans Wilson Line,* 287 U. S. 420, Mr. Justice BRANDEIS made the following statement:

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this court in The Malcolm Baxter, Jr. (France v. French Overseas Corporation), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view" (244-45). (Italics ours.)

It is true that the opinion of the Circuit Court of Appeals stated very briefly that the *Baxter* was unseaworthy and that fact could have been discovered by due diligence.

No authorities are cited in support of that proposition and it is contrary to the well established law upon the subject.

In a later decision of *The Galileo,* 54 Fed. (2d) 913, Mr. Justice SWAN, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit considered this whole

question and discussed the decision of this Court in *The Malcolm Baxter* case, and placed upon it an entirely different construction than that which is placed upon it by respondent. He also clearly pointed out that the right of the owner to limit liability was not based upon the question whether he used due diligence to make the vessel seaworthy but whether the unseaworthiness was with his privity or knowledge, and so impliedly overruled the remarks of Circuit Court of Appeals in the *Malcolm Baxter* case.

We shall now proceed to consider as briefly as possible the respondent's arguments that the petitioner should be denied the right to limit liability for the reasons given by WOOLSEY, *J.*, in the District Court.

The respondent says in the first instance that the examination made of the boat by Sweet, the petitioner's employee, was insufficient. It is said that Sweet merely "looked" at the boat, in an effort to create the impression that he simply glanced at the boat and no more.

The evidence in the case is so different, that it is somewhat difficult to comprehend why such an argument should be made.

The boat was only a floating box (Record, p. 17) which carried cargo only on her deck and none in her hold. She had no lining or no covering over the planks on her sides or ends and no covering over her bottom. If there was any leak in her hull it would have been quite apparent upon inspection.

Sweet went down into the hold of the boat and spent three-quarters of an hour in making an inspection of the boat with the aid of an electric flashlight (Record, p. 21). He examined the deck beams, and the planks on her sides, to see whether there were any leaks in them or whether she had any planks broken. He also examined her bottom and found no injuries or leaks of any kind whatsoever (p. 22). He said that the boat was in good condition and not leaking

(p. 19). He also examined her outside and said as far as he could see she was in good condition there.

His evidence as to her condition is confirmed by that of Gardner, a marine surveyor, who examined the boat when in a drydock, to which it was taken after the accident. He testified that the boat had longitudinal bulkheads in her hold, and that boats of that type of construction were stronger than those whose decks were supported by X braces (p. 83).

He said that he could find nothing in her condition at that time, which would have caused the accident (p. 88).

He testified that the oakum was in good condition (p. 94) and that except for the injuries received the boat was generally in good condition (p. 95).

There was no denial of his evidence.

WOOLSEY, *J.*, in the District Court, found that the inspection by Sweet was faulty and defective in a most curious way. He found, without any supporting evidence whatsoever, that there was a leak about the after corner of the boat and he then found that Sweet's inspection of the boat was faulty because he did not discover that imaginary leak.

The Circuit Court of Appeals having its attention called to the fact that there was no evidence supporting the statement in the opinion of the District Court, that there was a leak in the after corner of the vessel, suggested if it did not actually find, that the accident was due to leaks resulting the pressure of her load increased her draft. That conclusion was purely conjectural, but if true the leaks which were developed in that way could not have been discovered by any inspection whatsoever.

Respondent further argues that Sweet was not a proper person to make an inspection and argues that he had never built boats and was not an expert marine surveyor. This is the first time that we have ever heard it suggested that only marine surveyor can inspect a boat of this kind to determine

whether it is leaking or not. If these boats leak that fact will soon be developed either by pumping by the bargee, or, if there is any leak it would be discovered by an examination by the most inexpert person, because an excessive amount of water would be found in the bottom, entirely open to view. It would be just about as sensible to suggest that every time a washerwoman used a tub she is under the obligation to call in an expert cooper to inspect the tub to see whether it is in good condition or not.

Sweet, however, had experience in work of this kind and he was in charge of a gang of four men at the plant maintained by petitioner at 29th Street, for the purpose of making all ordinary repairs to its boats, above the light water line.

Respondent also complains that no test of the boat was made to ascertain her seaworthy condition. What respondent means by that argument we do not know, as we have never heard of any tests of such boats, except an examination of them such as was made by Sweet.

Respondent has argued that Sweet was required to use a picker to find out whether the oakum was in good condition, but the Circuit Court of Appeals said that it was not necessary to do so. But even if Sweet's examination was defective the petitioner is still entitled to limit liability under the cases which hold that the owner of a boat may delegate the duty of inspection to another person and that if the other person is negligent in the inspection that negligence is not within the privity or knowledge of the owner.

We have cited the cases upon this point in our main brief.

Petitioner goes further and contends that Sweet was a managing officer or agent of the petitioner. In the effort to sustain that contention the respondent has promoted Sweet from a mere employee into a managing officer by saying that he was the Marine Superintendent of petitioner.

Sweet said that he was the "superintendent of the marine department" of the petitioner, which was apparently a title

by courtesy. His authority is to be determined by the evidence, which shows that Sambraus, the vice president of the company, was really the managing officer of the company so far as concerns its boats.

He testified that he usually made the examination of the boats and that it was part of his duty at the time this accident occurred, but on this particular occasion he left the inspection to Mr. Sweet (Record, p. 74) (no doubt because of Sambraus' absence).

Mr. Sambraus testified as to Sweet's duty (p. 74):

> "Q. Was Mr. Sweet the manager of the work that you describe as taking care of the repair of your boats? A. Well, sort of superintendent of men, for he was continually there.
>
> Q. Who was his immediate superior in that work? A. Myself, personally."

The petitioner maintained a small force of about four men who did repair work under the supervision of Sweet.

Respondent also contends that petitioner should be denied its right to limit liability because it failed to produce records showing just when the boat had been in dry dock prior to this accident and the repairs which were then made. Sweet said that the boat had been in dry dock for repairs within less than a year before the accident either at Jersey City or Hunts Point, and that he thought that it was about eight months before the accident.

Petitioner, deeming the records of the dry dock to be irrelevant for the reason which we shall state hereafter, did not produce those records, which seemed to antagonize the Judge of the District Court who devoted considerable attention to the subject in the opinion and the respondent now goes into that question at length.

The Circuit Court of Appeals did not seem to think this question of any importance, saying (p. 133):

"Every inference points to the belief that the leaks appeared when the scow was submerged by her load, hence we put little weight on the failure of the Cullen Company to produce records of the dry dock repairs."

The records of the repairs of the dry dock would have been of no value. The men at the Cullen plant did all the necessary repairs to the boat above her light water line, that is when she was drawing about two feet. The only repairs which were made by the dry dock were on the bottom of the boat, and about two feet above it.

If the accident was caused by the leaking of the boat as found in the District Court that leak must have been above the light water line, and for that reason any record of repairs made on her bottom would have been quite irrelevant, although the District Court Judge laid such great stress upon the failure to produce the records of those repairs.

The District Judge found that the petitioner was not entitled to limit liability because it did not make more frequent inspections of the boat.

No authority is cited in support of that proposition and it seems to have been the result of confusion in the mind of the Court, between the provisions of the Harter Act and the Limited Liability Law which we have already pointed out.

Just how frequently a boat of this kind should be examined in order to permit the owner to limit liability does not appear in the opinion of the District Court, but the respondent contends that it is the owner's duty to make an inspection every time a boat is chartered, or every time cargo is loaded upon it, even if she is under charter at the time.

Certainly such an argument cannot be given any serious consideration. Charters of these boats in New York Harbor are generally made for an indefinite period and until the return of the boat. Sometimes the charter lasts for a few days only, sometimes for a week, sometimes for a longer time.

According to respondent's contention, therefore, even if the boat had been under charter only for a week and has carried her cargo without the slightest trouble, before loading any other cargo upon it the owner is compelled to have the boat examined by an expert marine surveyor, and possibly that the boat must be sent to a dry dock upon each occasion for a thorough examination.

The fallacy of such an argument is too obvious to require any discussion.

Under the rules which the respondent lays down a man is required to examine his watch every time he winds it up for the purpose of ascertaining its condition.

In conclusion we desire to call attention to the following finding of the Circuit Court of Appeals (p. 132):

> "In the case at bar the Cullen Company had no actual knowledge that she was in a leaky condition when sent out."

Respectfully submitted,

HORACE L. CHEYNEY,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1932

No. [redacted] 9

CULLEN FUEL COMPANY, INC., owner of the Deck Scow "CULLEN No. 32,"

Petitioner,

against

W. E. HEDGER, INC., bailee of cargo,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 772

CULLEN FUEL COMPANY, INC., owner of the Deck Scow "CULLEN No. 32,"
Petitioner,

against

W. E. HEDDEN, INC., bailee of cargo,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT AND IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement.

This is an application for a writ of certiorari by Cullen Fuel Company, Inc., owner of the scow *Cullen No. 32*, to review the decision of the United States Circuit Court of Appeals for the Second Circuit, wherein that Court denied to the petitioner the right to limitation of its liability for a cargo loss caused by the capsizing of the scow *No. 32* in New York Harbor on August 12, 1925.

The opinion of the Court is reported in 62 Fed. (2nd) at page 68.

Facts.

In order to understand the issues involved in this application it is necessary to supplement, to a considerable extent, the statement of facts contained in the petition.

The steamer *Berk* arrived at New York with a cargo of barytes ore consigned to Grasselli Chemical Company. The

Berk was tied up at the foot of Roosevelt Street, New York City, and the Grasselli Chemical Company employed W. E. Hedger Co., Inc., to transport the ore from the *Berk* to Grasselli, N. J. (Pierce, 515, Opinion, 958-959). On August 11, 1925, Hedger chartered, among others, the scow *No. 32* for the transportation of the ore to Grasselli (Sweet, 168; Pierce, 515-516).

Before the scow went under charter to Hedger, Sweet, the Marine Superintendent of her owner, purported to examine her to see if she was seaworthy. In that examination he went down in her hold, while she was lying light, and "looked at her deck beams" and at her sides "to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 184-185). Finding no broken planks nor any visible leaks, the scow was delivered to the charterer.

While the scow was in the process of loading the ore, she capsized and spilled her entire cargo, and both Courts below concurred in finding that the sinking was caused by pre-existing unseaworthiness of the scow.

ARGUMENT

I.

The result reached by the Circuit Court of Appeals was correct.

The District Court denied petitioner's right to limit liability upon the ground that the leaky condition of the scow could have been discovered by her owner if it had made a proper inspection of the vessel before putting her under charter.

The Circuit Court of Appeals considered it unnecessary to pass upon the holding in that respect, and held that the scow owner had breached its implied warranty of seaworthi-

ness, which defeated its right to limit liability. In this connection Judge SWAN said:

> "In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined."

In order to determine the correctness of the ruling of the District Court, and of the result reached by the Circuit Court of Appeals, it will be helpful to examine the evidence as to the inspection made of the scow by the petitioner before letting her under charter.

Sweet testified that he was the scow owner's Marine Superintendent, and that he had seen the boat before she went under charter, at which time he had "looked all around" (Sweet, 167, 169, 184). At that time the scow was light, drawing twenty inches to two feet (Sweet, 174-175).

On cross-examination the Marine Superintendent testified:

> "Q. Tell us exactly what you did when you made this examination? A. Well, I was down in there and I looked at her deck beams to see if they were—
>
> "Q. That is the beams, the upper beams on the deck? A. Yes; and I looked at her side to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 184-185).

Sweet's so-called examination was entirely visual, made when the scow was light, and he was content to rely on what he could see by flashing his light on her deck beams and side planks, and was apparently satisfied with the condition of the scow because he found no "planks broken."

Sambraus, petitioner's Vice President, admitted that such an inspection would not disclose the existence of a leak

above the light water line, and that "you have to guess at it" (Sambraus, 377).

The inadequacy of such an examination appears too clear to require argument.

Sweet purported to have also examined the outside of the scow's hull, but it developed that such "examination" was made by standing on her deck and looking down over her gunwale. Moreover, he could only see one of her sides at that time, for the other side was up against the pier (Sweet, 218).

It was not shown how old *No. 32* was, when she had last been caulked or in drydock for repairs, whether or not anything had happened to her between the time she carried her last cargo and the time she went under this charter, or that there was any regular system employed by petitioner with reference to the proper upkeep of its vessels.

Sweet testified that a record was kept by petitioner of all of its boats going into drydock for repairs, and that he had not even looked up those records to see when *No. 32* had last been repaired (Sweet, 200-201). Although he was petitioner's Marine Superintendent, he did not know the age of *No. 32* (Sweet, 203). As an apparent afterthought, he said that he had made an effort to locate the records, but could not find them (Sweet, 206); and that he "imagined" that the scow was at Jersey City Drydocks "within a year" before this casualty,—"I should think about eight months" (Sweet, 208-209).

It appears quite clear that the District Judge did not believe even Sweet's vague testimony concerning the upkeep of and repairs to the scow; for on the first day of the trial the Court warned the witness of the necessity of producing records of repairs from the drydocks. On Sweet's examination the following occurred:

> "The Court: Did you have the boat under repairs down at the Jersey City Drydock?

The Witness: No, sir, at Hunts Point Drydock.

The Court: Well, you can find out from there when it was done. You had better get some information on that to show that she was repaired" (Sweet, 210).

The trial of this case started on November 13, 1930. On the following day, November 14, it was adjourned to November 17. It was resumed on November 17 and was finally concluded on November 18 (Record, 2-3).

The Court warned the witness of the necessity of producing records of repairs on the first day of the trial. Thereafter, five days were available to petitioner to subpoena the records of any drydock which had done repair work on the barge. None was produced.

Sambraus, appellant's vice-president, testified on November 14, the second day of the trial, as follows:

"Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in drydock? A. No.

Q. Made no endeavor at all? A. No, I haven't, for I have been unable to find out from our own records.

The Court: He says he has been working on his own records very hard, and it apparently never occurred to him to go across the river and try to get these from the drydocks" (Sambraus, 359-360).

Santos, the scow man, testified that he had been captain of *No. 32* for a year prior to this accident, and he did not remember the scow ever having gone to drydock (Santos, 336).

The whole question of the lack of privity or knowledge on the part of petitioner in the condition of the scow, and of her history prior to this loss, was so evasively and secretively

handled by petitioner that there is very little wonder that the District Judge said:

> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.
>
> "The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers knew very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her" (Opinion, 984-985).

The burden of proof is upon the petitioner to show its lack of privity or knowledge in the unseaworthy condition of the scow, and such privity or knowledge is equivalent to failure to exercise due care in the proper inspection of the scow before putting her under charter.

In *The Malcolm Baxter, Jr.*, 20 Fed. (2nd) 304, the Circuit Court of Appeals for the Second Circuit, discussing this question, said:

> "The evidence sustains the finding of the District Court that the Baxter was unseaworthy when she left New Orleans, and that such fact *could have been discovered by due diligence.* The petition to limit liability was properly denied" (305). (Italics ours).

In that case this Court granted certiorari, and affirmed the decision of the Circuit Court of Appeals. Mr. Justice STONE, speaking for this Court, said:

> "Both courts below agreed that the Baxter was unseaworthy on sailing, and that respondent failed to *exercise due diligence to ascertain her condition* before sailing. This was sufficient ground for denying the petition for * * * limitation of liability." (277 U. S. 323, 331). (Italics ours).

In the recent case of *The Calvert,* 51 Fed. (2nd) 494, the Circuit Court of Appeals for the Fourth Circuit denied limitation of liability to a barge owner upon this same ground, saying:

> "If the inspecting officers did not know of the very bad condition in which the Calvert was before entering upon this trip, such ignorance was due to negligence in making their inspections, or in not making them at all. We agree with the District Court in its findings that the defendant company here is not entitled to limit its liability. It has not sustained the burden which the statute casts upon it before it can claim the benefit of this limitation" (498).

In the case of *Sanbern* v. *Wright,* 171 Fed. 449, aff'd (CCA 2) 179 Fed. 1021, a boat sank and lost her cargo without any apparent cause. The boat was held unseaworthy and her owner was denied the right to limit liability upon the ground that the responsible agent of the owner had failed to conduct a proper inspection of the boat before she was put into service. The Court said:

> "It is urged that the respondent if liable by reason of the condition of the vessels, is entitled to limit its liability to their value. * * * The determination of the question depends upon *which of the respondent's officers or agents knew or should have known of the condition of the vessels and what he did to inform himself thereof.* The president of the respondent was not able to testify to their condition because he did not keep himself familiar with it. He said that Mr. Mulvaney was general superintendent of such affairs and was expected to see that the boats were kept in good condition. There can be little doubt that Mulvaney was the one to whom the condition of the vessels should have been known. The Republic, 61 Fed. 109, 113, 9 C. C. A. 386. His testimony discloses that *he performed the duty of inspection in a very perfunctory manner.* He said in testifying about the

> Eagle that they did 'whatsoever had to be done; if the boat leaked in the bottom we put her on the dock and tended to it; if she wasn't leaking we didn't spend any money.' That is, it was left to the progress of decay to develop signs of weakness. * * * I can not regard such a method as a proper one in the performance of the duties of inspection, the burden of showing which was upon the vessel's owner. The Colima (D. C.) 82 Fed. 665, 679." (455) (Italics ours).

Thus, it is apparent that a vessel owner cannot claim to be without privity or knowledge of unseaworthiness if he fails to use diligence to inform himself of the condition of the vessel.

In the instant case, Sweet, the Marine Superintendent, was the one to whom the petitioner entrusted the duty of inspecting the scow. His own testimony shows that he performed his duty in a most perfunctory manner. He went down in the scow's hold and just "looked around" with a flashlight to see if any of her timbers were broken. The scow was only drawing twenty inches to two feet at the time, and it is clear that no leak would have been then visible. With respect to the tightness of her seams, he was content to look down the scow's sides by peering over her rails. He confined his "inspection" to what was revealed by his naked eye.

In *The Northern Belle,* 154 U. S. 571, Mr. Justice MILLER, delivering the opinion of this Court, said:

> "It is the duty of the carrier who offers * * * barges for service to have them often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become, from age, or decay, or injury, unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer.
>
> "For this the best interest of all parties requires that he shall be held rigidly responsible." (572).

The case of *Oregon* v. *Portland* (D. C. Ore.) 162 Fed. 912, involved the question of the right to limit liability for the sinking of the barge due to unseaworthiness. The officers of the corporate owner testified that they had inspected the barge. The Court denied the petition to limit, saying:

> "No expert or other person was appointed or required by either the manager or superintendent of the lumber company (petitioner) to make a survey of the barge Monarch to determine with respect to her seaworthiness—or fitness to undergo the service to which she was appointed under the demise; but these officers depended solely upon their own skill and ability for ascertainment of her condition" (921).

In re Meyers Excursion & N. Co., 57 Fed. 240, aff'd *The Republic* (CCA 2) 61 Fed. 109, a barge was hired to take a party on an excursion. In the course of the trip the barge encountered a severe wind storm, which lifted her hurricane deck and blew over the masts, killing several of the excursionists. The barge owner petitioned to limit its liability. The petition was dismissed. Judge BENEDICT said:

> "A proper examination of the vessel surely would have disclosed the unsound condition of the masts. * * * Such an examination would have disclosed the fact that the fastenings of the hurricane deck were insufficient. The petitioners *cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put*" (242-3) (Italics ours).

These cases, we respectfully submit, are directly in point with the case at bar, and go much further than the principle for which we contend. In the *Meyers* case the barge en-

countered a storm of some severity, but the Court held that the barge owner was not entitled to limit, inasmuch, as a *proper examination* would have disclosed the unseaworthy condition of the vessel. In the case at bar, there was no storm and the scow careened and sank in a calm and sheltered slip, undoubtedly as a result of a leak in her hull above her light water line, which was hot discovered in Sweet's cursory "inspection."

See also:

In re Reichert Towing Line (CCA 2) 251 Fed. 214, 217; cert. den. 248 U. S. 565;

In re P. Sanford Ross (CCA 2) 204 Fed. 248, 250-251;

Chesapeake, etc., Co. v. *Baltimore* (CCA 4) 40 Fed. (2) 394.

There can be very little doubt, it is submitted, that the negligence of Sweet, petitioner's Marine Superintendent, was sufficient to defeat the right of limitation. In such cases it has been frequently held that the negligence of the Managing Agent or Superintendent is the negligence of the owner.

In *Great Lakes Towing Co.* v. *Mills Transportation Co.* (CCA 6) 155 Fed. 11, cert. den. 207 U. S. 596 the Court said:

> "The acts of the *managing agent* within the sphere of his authority are as much the acts of the owner as if done by the owner himself." (21).

In accord, see:

In re P. Sanford Ross, Inc. (CCA 2) 204 Fed. 248,—neglect of petitioner's superintendent;

Sanbern v. *Wright & Cobb Lighterage Co.*, 171 Fed. 449, aff'd (CCA 2) 179 Fed. 1021,—failure of general superintendent to make proper inspection of unseaworthy boat;

In re Jeremiah Smith & Sons, Inc. (CCA 2) 193 Fed. 395,—neglect of managing agent of line at one of its terminal ports;

Parsons v. *Empire Transportation Co.* (CCA 9) 111 Fed. 202, cert. den. 183 U. S. 699,—knowledge of local agent at St. Michaels, Alaska;

The Benjamin Noble, 232 F. 382, aff'd (CCA 6) 244 Fed. 95, affirmed 249 U. S. 334,—act of managing agent in concurring in overloading;

Texas & Gulf S. S. Co. v. *Parker* (CCA 5) 263 Fed. 864, cert. den. 253 U. S. 488,—negligence of manager;

The Bessie J., 268 Fed. 66 (D. C. Mass.), aff'd (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620,—knowledge of fleet manager of negligent custom of masters;

Erie Lighter No. 108, 250 Fed. 490,—superintendent of the marine department of a railroad company.

II.

The case of *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd.*, is not in point with the issues involved here.

Earl & Stoddard v. *Ellermans Wilson Line, Ltd.* (*The Galileo*) 77 L. Ed. 242, 1933 A. M. C. 1, dealt, not with the limitation of liability statute with which we are concerned here, but with the Fire Act, 46 U. S. C. A. sec. 182. In that case, Mr. Justice BRANDEIS, delivering the opinion of this Court, was careful to limit the doctrine of the case to the Fire Act, and stated expressly that the decision was not to be confused with *The Malcolm Baxter, Jr., supra,* page 6, saying:

> "The courts have been careful not to thwart the purpose of fire statute by interpreting as 'neglect' of

> the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this Court in The Malcolm Baxter, Jr. (France v. French Overseas Corp.), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view." (244-245). (Italics ours).

And in *The Malcolm Baxter, Jr.*, the denial of the plea for limitation of liability was placed by this Court and by both subordinate Courts upon the ground that the *Baxter* was unseaworthy on sailing, and that her owner *"failed to exercise due diligence to ascertain her condition"* (277 U. S. 331), which was the identical ground upon which the District Judge rested his decision denying limitation of liability to the petitioner (Opinion, 988-989).

That the statute dealing with the *limitation* of a vessel owner's liability and the statute dealing with his *total lack* of liability for fire losses are separate and distinct, and should not be confused with each other, is further shown by the words of Mr. Justice BRANDEIS in *The Galileo, supra,* where he said:

> "Here the inquiry is not whether there was a 'personal contract,' on which the shipowner can be held for the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute." (77 L. Ed. 245).

The distinction is further borne out by the different rules of law applicable to the Acts respectively. For instance, under the Limited Liability Act the burden of proof is upon the vessel owner

> *The Benjamin Noble* (CCA 6) 244 Fed. 95, aff'd *Capital Transp. Co.* v. *Cambria Steel Co.*, 249 U. S. 334, 63 L. Ed. 631;

La Bourgogne (CCA 2) 144 Fed. 781, aff'd *Deslious* v. *La Compagnie,* 210 U. S. 95, 52 L. Ed. 973;

In re Reichert (CCA 2) 251 Fed. 214, cert. den. 248 U. S. 565, 63 L. Ed. 424;

McGill v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593, 51 L. Ed. 332;

In re Hedger (CCA 2) 59 Fed. (2nd) 982;

whereas under the Fire Act, the burden of proof is upon the cargo owner.

The Salvore (CCA 2) 60 Fed. (2nd) 683;
In re Old Dominion S. S. Co., 115 Fed. 845;
The Strathdon, 89 Fed. 374.

It is therefore respectfully submitted that the decision of this Court in *Earl & Stoddard* v. *Ellermans Wilson Line, Ltd., supra,* dealt solely with the fire statute and is altogether foreign to the issue presented in the instant case, and its doctrine is in no wise in conflict with the result reached by the Circuit Court of Appeals.

III.

The application for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

THOMAS H. MIDDLETON,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1933—No. 9

CULLEN FUEL COMPANY, INC., owner of the deck scow "CULLEN No. 32,"
Petitioner,

against

W. E. HEDGER CO., INC., bailee of the cargo,
Respondent.

BRIEF ON BEHALF OF THE RESPONDENT

Statement.

This case comes before this Court pursuant to a writ of certiorari granted herein to review the decision of the Circuit Court of Appeals for the Second Circuit. That decision denied petitioner limitation of its liability as owner of the scow *Cullen No. 32* for a cargo loss caused by the capsizing of the scow in New York Harbor on August 12, 1925. The opinion of the Circuit Court of Appeals is reported at 62 Fed. (2) 68, and the opinion of the District Court at 45 Fed. (2) 859.

Facts.

In August, 1925, the S. S. *Berk* arrived at New York with a cargo of barytes ore consigned to Grasselli Chemical Company. The *Berk* tied up at the foot of Roosevelt Street, New York City, and the Grasselli Chemical Company employed W. E. Hedger Co., Inc., respondent herein, to transport the ore from the *Berk* to Grasselli, N. J. (Pierce, 109).

On August 11, 1925, Hedger chartered, among others, the scow *No. 32* for the transportation of the ore to Grasselli. The charter was an oral one made over the telephone by S. W. Pierce, Vice-President of W. E. Hedger Co., Inc., and E. D. Sweet, Marine Superintendent of Cullen Fuel Company, Inc. (Sweet, 16-17; Pierce, 109-110).

Petitioner was then informed of the use to which the scow would be put while under charter (Pierce, 111).

Before the scow went under charter to Hedger, Sweet, the Marine Superintendent of the owner, purported to examine her to see if she was seaworthy. In that examination he went down in her hold, while she was lying light, and "looked at her deck beams" and her sides "to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 22). Finding no broken planks or any visible leaks, the scow was delivered to the charterer.

While the scow was in the process of loading the ore, she capsized and spilled her entire cargo and both Courts below concurred in finding that the sinking was caused by unseaworthiness of the scow existing at the time that she was delivered under charter.

POINTS

I.

The Court correctly denied limitation of liability to petitioner because of the breach of the warranty of seaworthiness which arose from petitioner's personal contract of charter.

1. The contract of charter was the personal contract of the petitioner.

There has never been any question as to Sweet's authority, as Marine Superintendent of petitioner, to enter into this

contract of charter so as validly to bind petitioner to the terms thereof. The petition for limitation of liability alleges that a valid charter was entered into between petitioner and respondent (Record, p. 2), and at page 41 of petitioner's brief, Sweet's authority to make the charter is reiterated. Petitioner there says, "No question is raised as to his (Sweet's) authority to make the contract."

Since Sweet was admittedly authorized to make the charter contract, surely petitioner cannot seriously argue that this charter, made by one with proper authority, is not "personal" to it. A corporation can act, of course, only through agents and representatives, and if the corporation gives its Marine Superintendent authority to charter its boats, the charters so entered into are exactly the same as though made by the president or any other officer having authority to charter the boats. It was not shown here whether it was the duty of any other officer than Sweet to handle the chartering work, and for all that the record discloses, Sweet was the only person connected with petitioner whose duties would include entering into contracts of charter on petitioner's behalf.

The test as to whether the contract made by Sweet was "personal" to the corporation is not the *title* under which he acts but rather the *authority* he has to bind the corporation. This was aptly stated by the Circuit Court of Appeals for the Second Circuit in *Proctor & Gamble* v. *Atlantic Oil Trans Co.*, 65 F. (2) 589 (1933). There Judge MANTON said:

> "The purpose of the limitation of liability statute was to exempt owners, beyond the value of the vessel and freight due, from the consequences of the acts, contractual or tortious, of the master, crew, or agent regulating the vessel beyond the control or supervision of the owner. The contracts of the master or other agent on the voyage or in foreign ports bind

only the ship. But the reason of that rule should forbid its application to contracts of hire entered into by an agent of the owner *with full authority* under the immediate supervision of the owner *no matter how subordinate a position the agent may occupy in the organization of the corporate owner.* In most corporate enterprises, the routine of business established by responsible officials leaves to subordinates full authority for the commission of the acts which create the corporation's contractual obligations. *If the routine established gives a subordinate the authority, the corporation cannot insist that only more important officials should bind it to personal obligations.* Its personal obligations should be determined by the *authority of the one making the contract* to transact that business and not by the importance of his official positions. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770; Capitol Transp. Co. v. Cambria Steel Co., 249 U. S. 334, 39 S. Ct. 292; 63 L. Ed. 631; Sun Oil Co. v. Dalzell Towing Co., 55 F. (2nd) 63 (C.C.A. 2) affirmed 287 U. S. 291, 53 S. Ct. 135, 77 L. Ed. 311; Great Lakes Towing Co. v. Mills Transp. Co., 155 F. 11, 22 L.R.A. (N. S.) 769 (C.C.A. 6)" (590-591). (Italics ours.)

Great Lakes Towing Co. v. *Mills Transportation Co.* (CCA 6) 155 Fed. 11 (1907), is a leading case on the subject of personal contracts. In that case the Great Lakes Towing Company had contracted with one McMorran, manager of respondent, to furnish, at specified rates, all towing and wrecking services required by respondent's steamers during a certain specified time. While the contract was in force, respondent's steamer *Newago* stranded on a reef and the towing company furnished wrecking services under its contract; but the *Newago* nevertheless became a total loss.

The chief question considered by the Court was whether the contract for towing and wrecking services was the personal contract of the Mills Transportation Company, owner

of the *Newago*. In holding this to be personal contract, the Court said:

> "The Mills Transportation Company, being a corporation, could act only through some agency. McMorran was the manager, and was vested with authority to make such contracts as this in behalf of the owner of the vessel, and the contract was the personal contract of the corporation, not in consequence of any principle peculiar to the maritime law, but by virtue of the *common-law rules of agency*.
>
> "But it is then said that the contract was made in behalf of the ship, and so was not the contract of the owner. This, however, rests upon an untenable theory. The contracts of the manager are the actual contracts of the owner, and are not of the same character as the contracts of the master made on a voyage or in foreign ports and which are imputed to the owner from the necessities of commerce" (21). (Italics ours.)

The decision in that case clearly points out the distinction between personal contracts and those not personal. If a corporation expressly authorizes *any one* to enter into a contract on its behalf the contract so made is the personal contract of the corporation, irrespective of the rank of the employee so authorized. On the other hand, the maritime law recognizes a distinction between "the contracts of a master made on a voyage or in foreign ports and which are imputed to the owner from necessities of commerce," and the contracts which bind a vessel owner "not in consequence of any principle peculiar to the maritime law, but by virtue of the common-law rules of agency." *Great Lakes Towing Co.* v. *Mill Transportation Co., supra.* Contracts made by a master and which are merely *imputed* to the owner are not "personal contracts" as the term is used in limitation of liability cases, while contracts which bind a vessel owner by virtue of the common-law rules of agency, are "personal contracts."

The charter in the instant case was no "imputed" obligation; it was an express undertaking of the petitioner, entered into by its duly authorized Marine Superintendent in the course of his duties as such.

Petitioner is guilty of looseness of thought where, under Point III of its brief (pp. 41-45), it argues that since Sweet was not an officer of petitioner, the contract was not personal to it "because the contract of charter was not made by any one of its managing officers but by an employee." As we have shown above, the contract was nevertheless duly authorized by petitioner and was therefore personal to it under the common-law rules of agency.

In the *Proctor & Gamble* case, *supra*, page 3, Judge MANTON also said:

> "The contract was made when the order for the barge was accepted by Capt. Long, an employee. That he had authority to accept orders for the hire of barges is unquestioned. He was appellee's tug dispatcher with full authority to order the movements of appellee's tugs and lighters. He also had authority to hire and discharge crews. He did not fix the rates or price for services rendered to the appellant, but this was done pursuant to the oral standing arrangement between the parties. He did, however, quote rates for individual orders for service. While it is true that there was testimony that in the office with Long there was a chief dispatcher who was his superior in position of employment, still Long accepted orders for tugs and lighters with his knowledge and consent. Long was not a subordinate without authority to bind the appellee to the extent claimed. He had authority to make this contract, and limitation may not be granted upon the theory that his position was so subordinate that the contract should not deprive his principal of limitation of liability" (590).

And further:

> "But it may be said that the corporate agent's authority determines only the validity of the contract but not the extent to which it may be enforced under the limitation of liability acts; that the policy of the statute permits limitation except where a responsible official acts, and so determines not only the validity of the contract, but also unlimited liability under it. Long's position in the corporation was sufficient to deprive it of limitation under this rule. He accepted orders for tugs and lighters and was a manager of the corporation within the rule announced in the cases holding that the contracts of a corporate manager are personal to the corporation. Capitol Transp. Co. v. Cambria Steel Co., supra; The Cullen #32, supra; The Loyal, supra; Great Lakes Towing Co. v. Mills, supra. Since the contract was personal within the rule stated, limitation should have been denied" (591).

It is submitted that Sweet's position and duties carried even more responsibility and authority than were vested in Long in the *Proctor & Gamble Co.* case, *supra.* Long was subordinate to a chief dispatcher, whereas Sweet, in charge of the marine department, had as his immediate superior the Vice-President of the corporation (Sambraus, 74).

As was said in *In Re P. Sanford Ross* (CCA 2) 204 Fed. 248 (1913),

> "* * * the real test is not as to their being officers in a strict sense, but as to the largeness of *their authority*" (251). (Italics ours.)

It is therefore respectfully submitted that under well settled principles, the charter made by Sweet, having admittedly been made with full authority of the corporate owner, was the personal contract of the owner.

2. The denial of limitation on the personal contract theory was proper.

The Circuit Court of Appeals denied to petitioner the right to limit its liability because of the breach of its warranty of seaworthiness implied in the contract of charter between petitioner and respondent.

This Court has repeatedly held that in every contract of charter the law affirmatively implies a warranty that the chartered vessel is seaworthy.

In *Oxford Paper Co.* v. *The Nidarholm*, 282 U. S. 681 (1931), this Court, by Mr. Justice STONE, said:

> "By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel, *which would otherwise have been implied*" (684). (Italics ours.)

And in *The Edwin I. Morrison*, 153 U. S. 199 (1894), this Court held that:

> "The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his (the shipowner's) knowledge or ignorance, his care of negligence" (210).

To like effect are the decisions in the following cases:

The Caledonia, 157 U. S. 124, 130 (1895);
Tucker Stevedoring Co. v. *Southwark Mfg. Co.* (CCA 3), 24 Fed. (2) 410 (1928), cert. den. 277 U. S. 598;
The Loyal (CCA 2), 204 Fed. 930 (1913);
Wessell Duval v. *Charleston Ltge. Co.*, 25 Fed. (2) 126 (1928).

Both Courts below have found that the scow *Cullen No. 32* was unseaworthy at the time she went under charter to respondent. Petitioner does not now question this finding of fact. It necessarily follows that petitioner has breached its warranty of seaworthiness.

The Circuit Court of Appeals denied to petitioner the right to limitation of liability because of this breach of warranty. This denial finds support in a long list of wholesome authorities, from *In Re Sinclair*, Fed. Cas. No. 12, 895 (22 Fed. Cas. 189), decided in 1860, to the decision of this Court in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, decided in 1919.

The warranty in the instant case was an implied one, as the oral charter was the usual harbor demise containing no express warranty as to the condition of the scow. But this Court has never distinguished between implied and express warranties of seaworthiness in determining the right of a vessel owner to limit liability in a case of cargo damage or charter. And as will be pointed out at greater length hereafter, in *Capitol Transportation Co.* v. *Cambria Steel Co.*, *supra*, the warranty of seaworthiness for the breach of which this Court denied limitation, was *one implied from the oral contract* of charter, there being no express representation as to the condition of the chartered vessel, which is exactly the situation in the instant case.

Since an implied warranty is just as much a part of a contract as the express terms thereof, there can be no logical distinction, we submit, between the two types of representations. In *Sacremento Nav. Co.* v. *Salz*, 273 U. S. 326 (1927), this Court said:

> "* * * a contract includes, not only the promises set forth in express words, but, in addition, *all such implied provisions* as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances

under which it was made. 3 Williston on Contracts S 1293; Brodie v. Cardiff Corporation, 1919 A. C. 337, 358" (329). (Italics ours.)

The denial of limitation to a vessel owner because of a breach of warranty of seaworthiness is based on the rule which holds that the limitation of liability statutes have no application to the personal contracts of the vessel owner. For these personal contracts the owner is liable without limitation.

Apparently the first reported decision in this country on the personal contract doctrine is found in *Re Sinclair,* Fed. Cas. No. 12,895 (22 Fed. Cas. 189), decided in 1860 by Judge MAGRATH in the Eastern District of South Carolina. In that case goods which had been shipped on the schooner *Ella* were damaged when the schooner had to be grounded because of a leak occasioned by her unseaworthiness. The owner of the schooner petitioned to limit his liability for the cargo losses to the value of the schooner. The Court held that petitioner was not entitled to limitation under the Act of 1851, since there had been a breach of the owner's *implied warranty* that the ship was seaworthy at the time of sailing. The Court said:

> "In this case the contract was with the master, but it was strictly within the limits of his authority, and became the contract of the owner, as complete and binding upon him, as if he had personally made it. The law connects with his contract a representation, presumed to have been given; inserts in it a covenant *presumed to have been made;* and that representation the law declares shall proceed from the owner; and that covenant be considered as made by him. It has ever been the policy of the law to refer the liability for seaworthiness directly to the owner and hold him liable for it. A loss from that cause is held to be a loss proceeding from a failure in a representation of the owner, a breach in his covenant" (193-194). (Italics ours.)

Although petitioner boldly states (Brief, p. 12), "So far as we are aware it has never been held in any case that under the provisions of the Act of 1851 the vessel owner is not entitled to limit liability where the damage or loss of cargo is without his privity or knowledge because he has entered into a personal contract for the carriage of goods," the decision in the *Sinclair* case was under the Act of 1851, and Judge MAGRATH squarely held that under that Act a vessel owner is not entitled to limitation of liability for cargo damage where he has breached an implied warranty of seaworthiness. Indeed, that decision was made in 1860, which was before the Act of 1884 had come into being.

We cannot follow the logic of petitioner's argument wherein it claims that all the decisions denying a vessel owner limitation of liability were rendered under the Act of 1884 rather than under the Act of 1851. Indeed, the wording of the Act of 1884 is much stronger in favor of *vessel owners* than is the wording of the Act of 1851, and if the Act of 1884 were read unattached from the Act of 1851, it would provide an absolute limit on the liability of *all* vessel owners for *all* losses, *without regard to their personal privity in the losses.* For the Act of 1884 contains nothing at all about "privity or knowledge" of the shipowner, and provides merely as follows:

> "The individual liability of a shipowner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same *shall not exceed the value of such vessels and freight pending.* * * *" (Italics ours.) (23 Stat. 57; 46 U.S.C.A. §189.)

Reading that Act alone, and unattached to the Act of 1851, the provision is for an absolute and unconditional limitation of the vessel owner's liability, regardless of any

breach of contract or gross personal neglect contributing to the loss; for the liability "shall not exceed the value of such vessels and freight pending," without any qualification.

The inconsistency of petitioner's argument respecting the Act of 1884 demonstrates its entire lack of soundness. Petitioner says (Brief, p. 13):

> "The decisions upon this subject (personal contracts in limitation of liability cases) have never considered the effect of the Act of 1851 at all but are all based upon the Act of 1884."

But how can a decision denying limitation be based upon an Act which contains no provision for the denial of limitation? The Act of 1851 contains a provision for the denial of limitation; the Act of 1884 does not. Yet petitioner is attempting to convince your Honors that the decisions denying limitation of liability because of personal contracts are based upon an act which, if read alone and without reference to the basic Act of 1851, grants an absolute and unconditional limitation of liability, and makes no provision at all for denying limitation.

Petitioner concedes the fallacy of its argument where it says (Brief, p. 13) that "The sole effect of the Act of 1884 was to enlarge the scope of the limitation laws and to permit the vessel owner to limit liability against claims not included within the provisions of the Act of 1851." For if the Act of 1884 merely enlarges the scope of the Act of 1851, it would clearly appear that the two must be construed together, and as part and parcel of the same law.

This Court so held in *Richardson* v. *Harmon*, 222 U. S. 96 (1911) where Mr. Justice LURTON said:

> "Neither is it necessary to conclude that the section in question (Section 18 of the Act of 1884) is a repealing act as to any of the qualifications of the preceding limitations found in §§4283, *et seq.*, of the

> Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose—that of extending the benefits of §§4283, *et seq.*, regardless of the owner's knowledge or privity.
>
> * * * * * * * *
>
> "We therefore conclude that the section in question was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included" (105).

The Act of 1851 conferred limitation of liability as to torts, etc., occurring without the owner's privity or knowledge, while the Act of 1884 merely extended that limitation to debts and other liabilities of the owner.

Such is the law as declared by the Circuit Court of Appeals for the Second Circuit (certiorari denied by this Court) in *American Warehouse* v. *Davison* (CCA 2) 240 Fed. 126 (1917), cert. den. 243 U. S. 642. There Judge WARD said:

> "It is now perfectly well settled that the acts of 1851 and 1884, are to be construed in *pari materia*. The former conferred exemption as to torts occurring without the privity or knowledge of the owner, and the latter extended this privilege to debts and other liabilities of the owner" (128).

And the doctrine that the two Acts are to be construed together is well settled.

In *Gokey* v. *Fort*, 44 Fed. 364 (1890), Judge ADDISON BROWN, six years after the passage of the Act of 1884, so held, saying:

> "I think the act of 1884 is doubtless to be treated *in pari materia* with the act of 1851 (Rev. St. §§4233, 4285,) and designed to extend the act of 1851 to cases of the master's acts or contracts, and thus bring our law into harmony with the general maritime law on the subject" (365).

In *The Republic* (CCA 2) 61 Fed. 109 (1894), Judge WALLACE said:

> "We do not understand it to be seriously argued that section 18 of the act of congress of June 26, 1884, displaces the liability of shipowners for losses occasioned by their own negligent acts. The section does not purport to repeal any pre-existing law, but is legislation in *pari materia* with the act of 1851" (113).

In *Great Lakes* v. *Mills* (CCA 6) 155 Fed. 11 (1907), cert. den. 207 U. S. 596, 52 L. Ed. 357, 28 S. Ct. 262, the Court, after quoting both the Act of 1851 and the Act of 1884, held that the two Acts should be construed together. The Court said:

> "These two provisions, relating as they do to the same class of persons and to the same subject, should be regarded as regulations in *pari materia*, and should be construed as *parts of an entire scheme*. We refer to this rule of construction of statutes in *pari materia*, because, as will be noticed, the words 'done, occasioned or incurred, without the privity or knowledge of such owner or owners,' which are contained in the act of 1851 are not employed in the act of 1884. * * * Another reason for thinking that the eighteenth section of the act of 1884 was intended as an extension merely of the relief provided by the act of 1851 is found in the fact that the act of 1851 contains provisions for the procedure in applying for limitation. * * * But the act of 1884 provides no procedure for administering its provisions. And this, we think, furnishes an inference that the act of 1851 was regarded as the basic law, to which section 18 of the act of 1884 was intended to be supplementary" (15). (Italics ours.)

In *Benner Line* v. *Pendleton* (CCA 2) 217 Fed. 497 (1914), affd. 246 U. S. 353, the Court also quoted the two Acts and Judge ROGERS said:

> "The two acts have been regarded as being in *pari materia* and therefore have been construed as parts of one entire scheme" (506).

See also:

Rudolph v. *Brown*, 137 Fed. 106 (1905).

How then can petitioner argue that whenever limitation has been denied because of a personal contract, the denial was under the Act of 1884 to the exclusion of the Act of 1851? The two Acts being part of the same scheme of legislation, and relating to an identical class of persons and an identical subject matter, denial of limitation for breach of a personal contract must necessarily have been decreed with both Acts under consideration. And moreover the denial of limitation must necessarily have been in all cases under the Act of 1851 as the basic law, for the Act of 1884 contains no provision whatsoever for denying limitation in any case except for seamen's wages. Petitioner has inadvertently recognized this, where, in the middle of page 26 of its brief, it refers to the Act of 1851 as the "basic statute."

It would therefore appear clear, and we respectfully submit, that wherever a decision denying limitation discusses the Act of 1884, the Act of 1851 must have been under consideration by the Court as the basic law on the question.

Apparently the next decision after Judge MAGRATH's decision in *Re Sinclair, supra*, page 10, involving the personal contract doctrine, was rendered in 1888 in the case of *The Amos D. Carver*, 35 Fed. 665 (1888). In that case the vessel was sold and her proceeds were insufficient to pay the claims of the several lienors. Judge ADDISON BROWN held that the vessel owners were responsible *in personam* for supplies furnished to the vessel upon their contract to pay for them. Judge BROWN said:

> "The act of 1884 limiting the liability of the owners of a vessel on account of the same, does not,

> I think, restrict the liability of the owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz., for the contracts or acts of the ship, or her master, without the owner's express intervention" (669).

The ruling was repeated by Judge BROWN in the following year in *Laverty* v. *Clausen,* 40 Fed. 542 (1889), in holding a vessel owner liable *in personam* for breach of a contract to insure cargo under the Act of 1851 and the Act of 1884. Again, a similar ruling was made by Judge NELSON in the District Court of Massachusetts in *McPhail* v. *Williams,* 41 Fed. 61 (1890) with respect to claims of material men for repairs and supplies furnished to the ship upon the authority of her owners. Judge NELSON said:

> "Certainly there was no occasion for Congress to legislate to limit the liability of shipowners on contracts which they enter into personally, or expressly authorize" (62).

A similar ruling was made by Judge ADDISON BROWN in *Gokey* v. *Fort,* 44 Fed. 364 (1890).

Evidently the next case wherein the question was passed upon was *Great Lakes Towing Co.* v. *Mill Transp. Co.* (CCA 6) 155 Fed. 11 (1907), cert. den. 207 U. S. 596, 28 S. Ct. 262. In that case a vessel owner had made a contract with a tug owner whereby the tug owner furnished services, including wrecking, to the vessels, at certain named rates. During the life of the contract, one of the steamers stranded in a place of great danger, and the tug owner dispatched a tug at the request of the vessel owner, to render wrecking services to the stranded vessel pursuant to the terms of the contract. The tug attempted for ten days to release the steamer from the strand, but her efforts were unsuccessful and the steamer was lost, only about $156 worth

of her equipment having been saved. The vessel owner then petitioned to limit its liability under the Acts of 1851 and of 1884, to the $156. The Circuit Court of Appeals denied the vessel owner's petition, saying:

> "It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about anything else and would be enforced in the courts in common-law actions. *It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value*" (16). (Italics ours.)

And further:

> "Most of the cases which have been referred to were cases of negligence or some other tort of the owners, but, if as we suppose we should hold liabilities arising from contracts are included by the 18th section of the act of 1884, it must, we think, be admitted that, as the statute ranks them together and makes no distinction as regards the ground of liability, if negligence on the part of the owner deprives him of the right to a limitation, surely *his voluntary creation of the liability ought with greater reason to bar his right to the limitation*" (21).

The first word spoken on the subject by this Court, so far as we have been able to find, is in *Richardson* v. *Harmon*, 222 U. S. 96 (1911), where Mr. Justice LURTON, speaking of the Limited Liability Acts, including the Act of 1851 as well as of 1884, said:

> "Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, * * * but *leaves him liable for his own* fault, neglect and *contracts*" (106). (Italics ours.)

The Loyal (CCA 2) 204 Fed. 930, decided in 1913, appears to be the first case wherein an Appellate Court held that an *implied* warranty of seaworthiness was such a personal undertaking on the part of the owners that the breach of such a warranty was sufficient to defeat limitation. In that case libelants rendered salvage services to owners of a cargo on a lighter which sprang a leak because of her unseaworthiness. The owners of the cargo contended that the lighter owner was liable for any salvage which it might have to pay libelant. The lighter owner attempted to limit liability, the lighter being a total loss. In denying to the lighter owner the right to limit, Judge NOYES said:

> "The vessel-owner had a written contract with the cargo-owner for lighterage services covering an extended period. This lighterage contract *implied an obligation* that the lighters to be furnished under it should be seaworthy and if this one were in fact unseaworthy (as we have found she was) and if the unseaworthiness made the salvage services necessary (as it unquestionably did) the salvage award ran properly against the vessel-owner subject to any right to limit its liability.
>
> "A vessel-owner is not entitled to limit his liability upon his personal contracts. The distinction between those contractual obligations which the owner of a vessel assumes himself by entering into them and those which are imputed to him for the acts of others on account of his ownership of the vessel, is well settled and is clearly pointed out in the opinion of the Circuit Court of Appeals for the Sixth Circuit in Great Lakes Towing Company v. Mills Transp. Company, 155 Fed. 11, * * *
>
> * * * * * * * * *
>
> "The implied contract that the lighter was seaworthy attached to the express contract was, in our opinion, *just as much the personal contract of the vessel-owner as the express contract itself.* It was

> precisely as if written in the contract. The liability which the owner assumed was a liability springing from its own stipulation and not at all one imputed to it by responsibility for the acts of others. It was a contract from which the owner could not obtain immunity by the limitation statute, and this whether the breach of the contract was caused by the owner's acts or those of its agents. We are unable to accept the contention that a vessel-owner may be relieved from responsibility upon his personal contracts provided he does not break them himself. *The making of the contract* is enough to place it outside the statute" (931-933). (Italics ours.)

Nor did *The Ice King* (CCA 2) 261 Fed. 897 (1919), overrule *The Loyal, supra,* as stated by petitioner (Brief, pp. 7-8). In that case a tow sustained damage on account of the pilot of the tug having become intoxicated, which rendered the tug unseaworthy. But the Court held that there was no *continuing* warranty of seaworthiness, and the tug having been seaworthy at the time of sailing, there was no breach of the warranty of seaworthiness. Indeed, Judge WARD was careful to distinguish *The Loyal* from *The Ice King,* where he pointed out that the doctrine of *The Loyal* was limited to cargo losses and had no application to a case of tug and tow. Although petitioner says that the decisions of the Circuit Court of Appeals for the Second Circuit "have been like the swing of a pendulum" (Brief, p. 15), the decisions of that Court have always been to the effect that the breach of an implied warranty of seaworthiness destroys the right to limit liability.

The Loyal was followed and approved by this Court in a decision wherein the rule stated in *Richardson* v. *Harmon, supra,* 222 U. S. 96, was reiterated and affirmed. That decision is *Pendleton* v. *Benner Line,* 246 U. S. 353, decided in 1918.

In *Pendleton* v. *Benner Line, supra,* a schooner was chartered to the Benner Line, the charter party containing the owner's express warranty of seaworthiness. Subsequently, and on account of the schooner's unseaworthiness, the schooner sank and her entire cargo was lost. In a suit brought by Benner Line against the owner to recover for the damages resulting from the sinking of the schooner, the owner (Pendleton) was denied the right of limitation of liability because of his personal contract. Mr. Justice HOLMES, delivering the opinion of the Court, said:

> "That the statute does not limit liability for the personal acts of the owners done with knowledge is established by *Richardson* v. *Harmon,* 222 U. S. 96. It was said in that case, p. 106, that §18 leaves the owner 'liable for his own fault, neglect and contracts.' The principle was held to apply to contracts less personal than this in *Great Lakes Towing Co.* v. *Mill Transportation Co.,* 155 Fed. Rep. 11, and in *The Loyal,* 204 Fed. Rep. 930. We are not disposed to disturb the very strong and deliberate intimations of *Richardson* v. *Harmon* in their application to the present case. It is said that the owners did their best to make the vessel seaworthy and that if it was not so the failure was wholly without the privity or knowledge of the petitioner. But that is not the material question in the case of a warranty. Unless the petitioner can be discharged from his contract altogether he must answer for the breach whether he was to blame for it or not" (356-357).

It is to be observed that this Court inferentially put its stamp of approval upon *The Loyal* by saying, "The principle was held to apply to contracts less personal than this in * * * *The Loyal,* 204 Fed. Rep. 930."

In *Luckenbach* v. *McCahan Sugar Co.,* 248 U. S. 139 (1918), the steamship *Julia Luckenbach* was under time charter to the Insular Line, the charter party containing an

express warranty of seaworthiness. In the suit brought by the Sugar Company for damage to cargo shipped on the *Luckenbach,* which resulted from the steamer's unseaworthiness, the vessel owner was denied the right of limitation of liability because of its personal contract. Mr. Justice BRANDEIS, delivering the opinion of this Court said:

> "The owners contend that, under §4283 of the Revised Statutes and §18 of the Act of June 26, 1884, c. 121, 23 Stat. 53, 57, their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. *But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. Pendleton* v. *Benner Line,* 246 U. S. 353" (149). (Italics ours.)

In *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 334 (1919), as in *The Loyal, supra,* the warranty of seaworthiness, the breach of which was held to defeat limitation of liability, was *implied* and not express. That case, we believe, is the first case wherein this Court passed upon the effect of a breach of an *implied* warranty, rather than an express warranty, on a vessel owner's right to obtain limitation of liability. This Court held that the breach of such a warranty defeated the right to limit, notwithstanding petitioner's statement that this Court has never held that "the vessel owner may not limit liability for cargo losses because he has made a personal contract, under which an implied warranty of the vessel (*sic*) is imputed to him by law" (Brief, p. 9). In that case the Cambria Steel Company was in the market to secure the transportation of certain steel rails from Conneaut, Ohio, to Superior, Wisconsin. An oral contract for the transportation was made between the Steel

Company and the corporate owner of the steamer *Benjamin Noble,* the latter being represented in the making of the contract by Mr. Francombe, the vessel's manager. The method by which the contract was made is thus stated in the District Court (*The Benjamin Noble,* 232 Fed. 382):

> "Mitchell & Co. (local agents) communicated with Mr. Francombe, and a contract was made between the Capitol Transportation Company, represented by Mr. Francombe, and the Cambria Steel Company, represented by Hanna & Co. for the transporting of these rails on the Nobel at a rate of 80 cents per ton" (384).

The further fact that the *Noble,* the carrying vessel, was intrinsically seaworthy and that her master and crew were qualified, was found by the Court, as follows:

> "So we start in with this well built and seaworthy ship (as to condition of hull and construction) at Conneaut, with a master and crew qualified for their positions; with the owner of the ship having made a *personal contract* with the owner of the cargo to carry 3000 tons of steel rails on the first trip of the season from Conneaut to Superior" (385).

The *Noble* left Conneaut after loading about 2950 tons of rails, and proceeded to Detroit and through the Soo Canal. Shortly after leaving the canal, a storm of considerable intensity came up and she was never heard of again. It was held that she was unseaworthy because of overloading and that her owners were not entitled to limit liability.

The Circuit Court of Appeals for the Sixth Circuit affirmed the decree (*The Benjamin Noble,* 244 Fed. 95), saying:

> "Francombe sanctioned and in effect made the verbal contract of affreightment out of which the present controversy grew; and the contractual obliga-

tion so created was the personal contract of appellant" (100).

The case then came before this Court pursuant to a writ of certiorari and this Court affirmed the decrees of both lower courts. Mr. Justice HOLMES said:

> "We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions further than the cases go. But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. *That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided* * * *" (336-337). (Italics ours.)

The holding in that case is, we respectfully submit, directly in point with the case at bar. There, as in the instant case, the contract was oral and there was no express warranty of seaworthiness. This Court nevertheless implied a warranty of seaworthiness into the oral contract, and, on the breach of the implied warranty, denied limitation of liability to the vessel owner. Under the authority of this Court's decision in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* it is respectfully submitted that the petition of Cullen Fuel Company for limitation of liability was properly denied.

The rule to the effect that the breach of an *implied* warranty of seaworthiness will defeat limitation, has also been followed in Third Circuit in the recent case of *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.* (CCA 3) 24 Fed. (2)

410 (1928), cert. den. 277 U. S. 598. In that case a lighter sank because of unseaworthiness, and her cargo became a total loss. The Circuit Court of Appeals held that the owner of the lighter was not entitled to limit liability because it had breached its implied warranty of seaworthiness in the lighterage contract. The Court said:

> "The contract contained no stipulation that the barges were to be seaworthy, so the question is: Was there an *implied contract* of lighter seaworthiness *which the law writes into this contract* for lighterage service? The present contract being for lighterage, we think there was an implied contract that the lighters would be seaworthy. In that regard we agree with the holding of The Loyal (C. C. A.), 204 Fed. 931, where it was said: 'The vessel owner had a written contract with the cargo owner for lighterage services covering an extended period. This lighterage contract implied an obligation that the lighter to be furnished under it should be seaworthy. * * * The implied contract that the lighter was seaworthy attached to the * * * contract, was, in our opinion, just as much the personal contract of the vessel owner as the express contract itself. It was precisely as if written in the contract.'
>
> "Such being the case, and the contract in hand having imported into it a stipulation for seaworthiness, and thereby made the personal contract of the lighterage company, we agree with the reasoning of the Circuit Court of Appeals of the Second Circuit in the foregoing case, and that of the Sixth Circuit in Great Lakes Towing Co. v. Mill Transp. Co., 155 Fed. 11" (410). (Italics ours.)

Petitioner apparently does not question the soundness of the decisions of this Court and of other Federal Courts denying limitation of liability for the breach of an *express* personal contract, but argues that such a doctrine should

not apply in a case where the breach is of an *implied* provision of the contract.

But is there any force in the contention that an implied stipulation in a contract does not have all of the valid and binding effect which would have attached had the stipulation been expressed? It is respectfully submitted that there is no reason or authority for such an argument.

It has been settled by decisions which are legion that an implied provision of a contract is just as valid and binding on the parties as are the expressed provisions, and that a provision necessarily implied gains nothing by being expressed.

Thus, in *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall. (75 U. S.) 276 (1868), Mr. Justice CLIFFORD, speaking for this Court, said:

> "Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed" (288).

In *Zanes* v. *Lehigh Valley Transit Co.*, 41 Fed. (2) 552 (1930), the Court said:

> "Aside from statutes of fraud or other control of the forms of contracts, we see no difference in the obligation or binding force of contracts, *whether they be express or implied*" (554). (Italics ours.)

In *Grossman* v. *Schenker*, 206 N. Y. 466, 100 N. E. 39 (1912), the Court of Appeals of New York said:

> "'What is implied in an express contract is as much a part of it as what is expressed' (Bishop on Contracts [2d ed.], §241); for 'the law is a silent factor in every contract'" (469).

In the case at bar, the express contract was for the hire of the scow, but the law, "a silent factor in every contract,"

implied the owner's warranty that the scow was seaworthy, and, we submit, the implied provision as to seaworthiness is as much a part of the contract of charter as that which was expressed.

In *United States* v. *Bentley*, 293 Fed. 229 (1923), the Court said:

> "The * * * right * * * if not affirmatively expressed, is at least necessarily implied, and what is implied is *as much a part of the contract as what is expressed*" (240). (Italics ours.)

In *Johnson* v. *City of New York* (N. Y.), 191 App. Div. 205, 181 N. Y. Sup. 137 (1920), affd. 231 N. Y. 563, 132 N. E. 889, the Court said:

> "An obligation necessarily implied from the whole purpose and scope of the contract, is as much a part thereof as if expressed in its wording. Mansfield v. N. Y. C. & H. R. R. R. Co., 102 N. Y. 205, 6. N. E. 386; City of New York v. Paoli, 202 N. Y. 18, 94 N. E. 1077; Wigand v. Backmann-Bechtel Brewing Co., 222 N. Y. 278, 118 N. E. 618" (139).

See also:

> *Fellows* v. *Fairbanks* (N. Y.) 205 App. Div. 271, 199 N. Y. Sup. 772 (1923).

There are, it is true, some cases which distinguish between the breach of an implied warranty and an express warranty, but we submit that those cases are in the minority, and that a sound and logical rule requires that no such distinction be made. Indeed, as we have pointed out *supra*, this Court made no such distinction in *Capitol Transportation Co.* v. *Cambria Steel Co., supra*, page 21, and denied limitation of liability for breach of an implied warranty of seaworthiness, exactly as is involved in the instant case.

Petitioner, at page 31 of its brief, mentions the Fire Act, and argues that the rule as to personal contracts in limitation of liability cases must apply with equal force to losses involving the application of the Fire Act. But this Court has held that the Fire Act and the Limitation of Liability Acts are separate and distinct acts, and that rules which apply in limitation cases have no application to cases under the Fire Act. Thus in *Earl & Stoddard* v. *Ellerman's Wilson Line, Ltd.* (*The Galileo*), 77 L. Ed. 242, 1933 A. M. C. 1, which involved the Fire Act, this Court declared that the doctrine of the case was not to be confused with *The Malcolm Baxter*, 277 U. S. 323, which was a limitation of liability and Harter Act case. Mr. Justice BRANDEIS said:

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what *in other connections* is held to be a non-delegable duty. Nothing contained in the opinion of this Court in The Malcolm Baxter, Jr. (France v. French Overseas Corp.), 277 U. S. 323, 72 L. Ed. 901, 48 S. Ct. 516, is to be taken as indicating a different view" (244-245). (Italics ours.)

And in *The Malcolm Baxter, Jr.*, the denial of the plea for limitation of liability was placed by this Court and by both subordinate Courts upon the ground that the *Baxter* was unseaworthy on sailing, and that her owner *"failed to exercise due diligence to ascertain her condition"* (277 U. S. 331), which was the identical ground upon which the District Judge rested his decision denying limitation of liability to the petitioner in the instant case. This point is treated in this brief under Point III, *infra*.

That the statute dealing with the *limitation* of a vessel owner's liability and the statute dealing with his *total lack* of liability for fire losses are separate and distinct, and should not be confused with each other, is further shown

by the words of Mr. Justice BRANDEIS in *The Galileo, supra,* where he said:

> "Here the inquiry is not whether there was a 'personal contract,' on which the shipowner can be held to the full amount of the loss, but whether he can be held liable at all. He cannot be held liable unless by agreement, or otherwise, he has waived the benefit of the fire statute" (77 L. Ed. 245).

The distinction between the two acts is further borne out by the different rules of law applicable to the Acts respectively. For instance, under the Limited Liability Act the burden of proof is upon the vessel owner:

The Benjamin Noble (CCA 6) 244 Fed. 95, affd. *Capitol Transp. Co.* v. *Cambria Steel Co.,* 249 U. S. 334, 63 L. Ed. 631;
La Bourgogne (CCA 2) 144 Fed. 781, affd. *Deslions* v. *La Compagnie,* 210 U. S. 95, 52 L. Ed. 973;
In re Reichert (CCA 2) 251 Fed. 214, cert. den. 248 U. S. 565, 63 L. Ed. 424;
McGill v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593, 51 L. Ed. 332;
In re Hedger (CCA 2) 59 Fed. (2nd) 982;

whereas under the Fire Act, the burden of proof is upon the cargo owner:

The Salvore (CCA 2) 60 Fed. (2) 683;
In re Old Dominion S. S. Co., 115 Fed. 845;
The Strathdon, 89 Fed. 374.

Concluding this point, it is respectfully submitted that since Sweet admittedly had petitioner's full authority to make the contract of charter as petitioner's agent in this case, the contract was as personal to petitioner as if it had been made by any other of petitioner's duly authorized

agents; this Court had never made any distinction between an implied warranty and an express warranty of seaworthiness and in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* pages 21-23, denied limitation of liability for the breach of such an implied warranty; in principle there should be no distinction between the two classes of warranties, for, as this Court said in *Hudson Canal Co.* v. *Pennsylvania Coal Co., supra,* page 25, "Necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed"; the petitioner, therefore, was properly denied limitation for breach of its warranty of seaworthiness.

II.

The Court properly held that respondent was entitled to maintain this suit as bailee of the cargo.

Petitioner argues (Brief, pp. 36-41) that petitioner made no contract for the carriage of cargo and that respondent has no standing in court to complain of the cargo loss, although respondent was the bailee of the cargo at the time, and notwithstanding that petitioner admits that respondent was thereby entitled to maintain a suit, arising out of his bare possession of the property, against the party responsible for the loss (Brief, p. 39).

No question as to respondent's right to maintain the suit was raised in the District Court, and it came up for the first time on the argument in the Circuit Court of Appeals. The record, therefore, did not contain any of the details of Hedger's relation with its underwriters or with the Grasselli Chemical Company, for which Hedger was transporting the cargo at the time of the loss. At the beginning of the trial it was merely stipulated that Hedger, as demise charterer,

was bailee of the cargo (Record, 16). But this much was shown by the record:

Hedger had agreed with the Grasselli Chemical Company to transport the cargo of the steamer *Berk,* then at the foot of Roosevelt Street, East River, New York, to Grasselli, New Jersey, and it was pursuant to that contract that the scow *No. 32* had been chartered and loaded with pyrites ore from the *Berk* (Pierce, 109; Opinion of District Court, 115; Opinion of Circuit Court of Appeals, 131).

Hedger, therefore, as a matter of law, warranted the seaworthiness of the scow to the Grasselli Chemical Co., and was liable to that company for a cargo loss caused by the scow's unseaworthiness. Therefore, the bailee's right to sue could be placed upon its liability over to the cargo owner (as this Court held in *Pendleton* v. *Benner Line, supra,* p. 19) or upon its mere possession of the goods, as petitioner concedes at page 39 of its brief.

The Circuit Court of Appeals chose to permit the respondent-bailee to maintain the suit upon the former ground, saying:

> "The question arises whether the Hedger Company as bailee of the cargo can recover for its loss upon the Cullen Company's breach of warranty of seaworthiness. Pendleton v. Benner Line, 246 U. S. 353, 38 S. Ct. 330, 62 L. Ed. 770, so decided, where the libellant, the charterer, was liable for the shipper's loss and was suing for the cargo underwriters. The present case will be controlled by that authority provided the Hedger Company is shown to be liable to the cargo owner, Grasselli Chemical Company. While it does not definitely appear what were the relations between the Hedger Company and the Grasselli Company, it was proved that the former agreed to carry the cargo for the latter and *prima facie* this made it liable for the loss. Taylor Bros. Lumber Co. v. Sunset Lighterage Co., supra. The lighterage contract implies a

warranty that the lighters to be furnished under it shall be seaworthy. The Loyal, 204 F. 930 (C.C.A. 2); The Jungshoved, 290 F. 733 (C.C.A. 2). If there were any express conditions in the contract which would excuse the Hedger Company as against the cargo owner, they do not appear. Hence the proof was sufficient that the charterer was liable for loss of cargo due to the scow's unseaworthiness. See The Harper No. 145, 42 F. (2d) 161 (C.C.A. 2); S. C. Loveland v. Bethlehem Steel Co., 33 F. (2d) 655 (C.C.A. 3). This liability is a proper element of damages in its suit against the owner upon the latter's covenant. Pendleton v. Benner Line, supra" (*The Cullen No. 32* [CCA 2] 62 Fed. [2] 68, 69-70; Record, p. 131).

In its brief petitioner argues that the right of the bailee to sue for damages to the bailed property arises merely out of his possession of the property. Petitioner says:

> "While it is undoubtedly true that the historical origin of the right of a bailee to sue for damage to the property in his possession under a bailment rests upon the theory of the liability of the bailee over, yet we submit that Mr. Justice Holmes (in Pendleton v. Benner Line) stated that that doctrine is inadequate and we submit that the more modern theory is, that the right of the bailee to recover arises out of his possession of the property, which he has a right to maintain as against the entire world, except the bailor under some conditions" (Brief, p. 39).

We confess that we are unable to see why any different result should be reached by making such a distinction. If the bailee has a right to sue for damage to the bailed property by reason of his possession of the property, we submit that the respondent herein is entitled to maintain this suit, regardless, indeed, of its liability over to the cargo owner. But as we have argued *supra*, the bailee was liable over to

the cargo owner, and the Circuit Court of Appeals so found and held.

Such was the reasoning of this Court in permitting the bailee to maintain the suit in *Pendleton* v. *Benner Line*, *supra*, page 19. In that case suit was brought by the Benner Line, as charterer of a schooner and as bailee of the cargo laden thereon, against Pendleton Brothers, the owners of the schooner, *in personam* to recover for the loss of the cargo, resulting from the sinking and total loss of the schooner. The ground of the suit was the unseaworthiness of the vessel, whereby the cargo loss resulted, and the owners of the vessel petitioned for limitation of their liability. The Benner Line (the charterer bailee) had not paid the owners of the cargo for the loss, nor had it been called upon to pay, and brought the suit solely on the theory of its relation of bailee to the cargo owners. This Court held that it was entitled to maintain the suit. Mr. Justice HOLMES, after discussing the charter of the schooner (which was *not* a demise) and the question of who had possession of the goods when they were lost, decided that the charterer bailee was entitled to maintain the suit, and said:

> "The owners of the vessel had warranted the seaworthiness of the ship to the charterer, of course in contemplation that a cargo would be shipped as to which they would be liable in some form. Wherever in theory of law the technical possession may have been, we do not perceive why the charterer should be denied full damages upon the express contract when its liability over also was determined by contract exactly as was expected. The ground upon which bailees have been allowed to recover the full value of goods from wrongdoers has been stated for centuries to be their liability over. Y. B. 9 Ed. IV, 34 pl. 9, is an example of what has been repeated from that day to this. See *Brewster* v. *Warner*, 136 Massachusetts 57, 59. Whatever may be the inadequacy, in history or

> theory, of the reason as applied to torts, *it applies with real force to contract relations like those in this case.* The whole question is hardly more than technical as there is no doubt that this suit really represents the owners' interests since it is brought at the request of the insurers who have paid the loss" (355-356). (Italics ours.)

That case, we respectfully submit, establishes the right of the charterer to proceed as bailee against the owner *in personam* for breach of the warranty of seaworthiness, and recover full damages to the cargo. We beg your Honors to consider the similarity between the *Pendleton* case and the case on appeal. In both cases vessels were chartered to carry the goods of third parties; in both cases the vessels sank because of unseaworthiness and the goods were lost; in both cases *in rem* liability was of no value and the only hope of recovery was the *in personam* liability of the owners of the vessel; in both cases the warranty of the vessel's seaworthiness was made by the owner to the charterer only, and not to the owners of the cargo; in both cases the owner knew that the purpose of the charter was to carry cargo. And in the *Pendleton* case the charterer-bailee had not even been asked to pay for the loss of the cargo, and yet it was allowed to maintain the suit against the owners of the vessel on the ground of its liability over to the cargo owners.

Petitioner makes an abortive attempt (Brief, p. 37) to distinguish between the instant case and the *Pendleton* case. Petitioner says:

> "There is a marked distinction between the *Pendleton* case and the present one. In the former case Pendleton, the owner of the schooner, made a charter to the Benner Line but that charter did not amount to a demise, while the charter in this instant case was a demise."

Petitioner fails to state the effect of that distinction; and the only effect that we can perceive is that in the instant case Hedger was even more of a bailee than was the Benner Line in the *Pendleton* case. For it appears obvious that a demise charterer has more exclusive possession of the goods on the chartered vessel than does a time charterer or a voyage charterer. Thus, we submit, the demise charterer in the instant case, should be held more clearly entitled to maintain the suit than was the charterer in the *Pendleton* case.

In *Luckenbach* v. *McCahan Sugar Co., supra*, p. 20, the cargo owner was allowed a full recovery against the owner of the vessel on the breach of the latter's warranty of seaworthiness made to the charterer, the Insular Line, although there was no privity of contract between the cargo owner and the vessel owner, and the vessel owner was denied limitation of its liability for the cargo loss.

Petitioner also mentions the fact (Brief, p. 36) that:

> "Cullen warranted the seaworthiness of the barge to Hedger, but that warranty was only as to the seaworthiness of the boat at the time of its delivery to the charterer and it was not a continuing one."

But both Courts below concurred in finding that the scow was unseaworthy *at the time of her delivery* under charter.

The Cullen No. 32 (D. C.) 45 Fed. (2) 859, 862-863;

The Cullen No. 32 (CCA) 62 Fed. (2) 68, 69.

III.

Regardless of the effect of petitioner's breach of warranty, it was correctly denied limitation because it utterly failed to prove its freedom from privity or knowledge in the unseaworthy condition of the scow.

The decision in the District Court, denying petitioner limitation of its liability, was placed upon the ground that the responsible agent of petitioner, who should have kept himself familiar with the condition of the scow, had failed to do so and that the ensuing cargo loss was accordingly within the privity or knowledge of petitioner.

The rule is well settled that the failure to conduct a proper and sufficient examination of a vessel before loading cargo upon her, or before letting her under charter, is sufficient to render her owner in "privity or knowledge" of her unseaworthy condition, if cargo sustains damage from the vessel's unseaworthiness.

Such was the holding of both this Court and of the Circuit Court of Appeals for the Second Circuit in *The Malcolm Baxter* (CCA 2) 20 Fed. (2) 304, affd. 277 U. S. 323.

In passing upon that question the Circuit Court of Appeals said:

> "The evidence sustains the finding of the District Court that the Baxter was unseaworthy when she left New Orleans, and that such fact *could have been discovered by due diligence.* The petition to limit liability was properly denied" (20 Fed. (2) 305). (Italics ours.)

When the case was before this Court on certiorari, Mr. Justice STONE said:

> "Both courts below agreed that the Baxter was unseaworthy on sailing, and that respondent (petitioner for limitation) *failed to exercise due diligence to as-*

> *certain her condition* before sailing. This was sufficient ground for denying the petition for * * * limitation of liability" (277. U. S. 331). (Italics ours.)

What diligence, then, did petitioner exercise to ascertain the condition of *No. 32* before letting her under charter to respondent?

The only inspection or examination conducted by petitioner was the cursory and perfunctory "looking over" by Sweet, petitioner's Marine Superintendent. Sweet testified that he had "seen the boat" before she was put under charter. At that time she was light, drawing about two feet of water. Sweet's examination consisted of going through the boat with a flashlight, with which he "looked all around" (Sweet, 19, 21-22).

He testified:

> "Q. Tell us exactly what you did when you made this examination? A. Well, I was down in there and I looked at her deck beams to see if they were—
>
> Q. That is the beams, the upper beams on the deck? A. Yes; and I looked at her sides to see if there were any leaks in her sides or if she had any planks broken" (Sweet, 22).

Sweet was content to rely on what he could see by flashing his light on her deck beams and side planks, and was apparently satisfied with the condition of the scow because he found no "planks broken."

Sambraus, Vice President of the scow owner, admitted that such an inspection would not disclose the existence of a leak above the light water line, and that "you have to guess at it" (Sambraus, 76).

Sweet purported to have also examined the outside of the scow's hull, but it developed that such "examination" was made by standing on her deck and looking down over her

gunwale. Moreover, he could only see one of her sides at that time, for the other side was up against the pier (Sweet, 31).

It was not shown how old *No. 32* was, when she had last been caulked or in drydock for repairs, whether or not anything had happened to her between the time she carried her last cargo and the time she went under this charter, or that there was any regular system employed by petitioner with reference to the proper upkeep of its vessels.

Sweet testified that a record was kept by petitioner of all of its boats going into drydock for repairs, and that he had not even looked up those records to see when *No. 32* had last been repaired (Sweet, 26). Although he was petitioner's Marine Superintendent, he did not know the age of *No. 32* (Sweet, 27). As an apparent afterthought, he said that he *had* made an effort to locate the records, but could not find them (Sweet, 28); and that he "imagined" that the scow was at the Jersey City Drydocks "within a year" before this casualty, "I should think about eight months" (Sweet, 29).

It appears quite clear that Judge WOOLSEY, who heard the case in the District Court, did not believe even Sweet's vague testimony concerning the upkeep of and repairs to the scow; for on the first day of the trial the Court warned the witness of the necessity of producing records of repairs from the drydocks. On Sweet's examination the following occurred:

> "The Court: Did you have the boat under repairs down at the Jersey City Drydock?
>
> The Witness: No, sir, at Hunts Point Drydock.
>
> The Court: Well, you can find out from there when it was done. *You had better get some information* on that *to show that she was repaired*" (Record, 29). (Italics ours.)

The trial of this case started on November 13, 1930. On the following day, November 14, it was adjourned to November 17. It was resumed on November 17 and was finally concluded on November 18 (Record, 1).

The Court warned the witness of the necessity of producing records of repairs on the first day of the trial. Thereafter, five days were available to petitioner to subpoena the records of any drydock which had done repair work on the barge. None was produced.

Sambraus, petitioner's Vice-President, testified on November 14, the second day of the trial, as follows:

> "Q. Have you endeavored to ascertain from the Jersey City or Hunts Point Drydock when this boat was in the drydock? A. No.
>
> Q. Made no endeavor at all? A. No, I haven't, for I have been unable to find out from our own records.
>
> The Court: He says he has been working on his own records very hard, and it apparently never occurred to him to go across the river and try to to get these from the drydocks" (Sambraus, 71).

Santos, the scow man, testified that he had been captain of *No. 32* for a year prior to this accident, and he did not remember the scow ever having gone to drydock (Santos, 64-65).

The whole question of the lack of privity or knowledge on the part of petitioner in the condition of the scow, and of her history prior to this loss, was so evasively and secretively handled by petitioner that there is very little wonder that the District Judge said:

> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind.

"The records of this particular scow perhaps may have been lost as is claimed during the moving of her owner from one office to another, but her owner's officers knew very well where all her repairs had been made and they did not call anyone from the repair yards to testify in regard to her" (Opinion, 122).

In *Sanborn* v. *Wright*, 171 Fed. 449 (1909), affd. (CCA 2) 179 Fed. 1021, a boat sank and lost her cargo without any apparent cause. The boat was found to have been unseaworthy and her owner was denied the right to limit liability upon the ground that the responsible agent of the owner had failed to conduct a proper inspection of the boat before she was put into service. The Court said:

"It is urged that the respondent if liable by reason of the condition of the vessels, is entitled to limit its liability to their value * * *. The determination of the question depends upon which of the respondent's officers or agents knew or should have known of the condition of the vessels and what he did to inform himself thereof. The president of the respondent was not able to testify to their condition because he did not keep himself familiar with it. He said that Mr. Mulvaney was general superintendent of such affairs and was expected to see that the boats were kept in good condition. There can be little doubt that Mulvaney was the one to whom the condition of the vessels should have been known. The Republic, 61 Fed. 109, 113, 9 C.C.A. 386. His testimony discloses that *he performed the duty of inspection in a very perfunctory manner.* He said in testifying about the Eagle that they did 'whatsoever had to be done; *if the boat leaked in the bottom we put her on the dock and tended to it; if she wasn't leaking we didn't spend any money.*' That is, it was left to the progress of decay to develop signs of weakness. * * * I can not regard such a method as a proper one in the performance of the duties of inspection, the burden of showing which was upon the vessel's owner. The Colima (D. C.) 82 Fed. 665, 679" (455).

The District Court in the instant case denied limitation of liability to petitioner upon the ground that the leaky condition of the scow could have been discovered by the petitioner if it had made a proper inspection of the vessel before putting her under charter. Judge Woolsey said:

> "I think such inspection of the Cullen #32 as was made before she was put on the charter and was lying light, drawing perhaps 18 inches to 2 feet of water, is not sufficient to satisfy the requirement of the situation.
>
> "It does not appear when she had been last caulked, the history of the scow was not shown with the frankness and in the detail that would be necessary to create a feeling of confidence in it in my mind..
>
> * * * * * * * *
>
> "Apparently a report by the master of the scow of a leak found was the only basis of or the reason for any examination other than walking around inside the scow when she was light to see whether there was any leak in her bottom and whether her beams were intact.
>
> "In other words, the Cullen Fuel Company, Inc., was indulging in a procedure which may, perhaps, be conveniently called a hearsay inspection.
>
> * * * * * * * *
>
> "The owner of the scow was here in port; the possibility of frequent observation of the scow by it is shown. The fact is that the scow was almost continually available for examination. In such a situation I think that her owners cannot be deemed entitled to have maintained the burden of proof to limit its liability on the facts as shown here" (45 Fed. (2) 863; Record, 122-123).

The Circuit Court of Appeals considered it unnecessary to pass upon this holding with respect to the petitioner's privity or knowledge of the unseaworthy condition of the

scow, and based its decision on the breach by petitioner of its implied warranty of seaworthiness. In this connection Judge SWAN said:

> "In the court below limitation was denied upon the ground that the fault existed with the owner's privity or knowledge because no adequate examination of the scow was made before her delivery on charter. Since we follow The Loyal, the correctness of this ruling need not now be determined" (62 Fed. (2) 70; Record, 132).

Regardless of any question of law involved *as to* the right of a vessel owner to limit its liability for the breach of an implied warranty of seaworthiness, we respectfully submit that on the facts as found by the District Court petitioner was properly and correctly denied limitation of its liability.

In *The Calvert* (CCA 4) 51 Fed. (2) 494 (1931), the Court, in denying limitation of liability to a barge owner for damage caused by unseaworthiness of the barge, said:

> "If the inspecting officers did not know of the very bad condition in which the Calvert was before entering upon this trip, such ignorance was due to negligence in making their inspections, or in not making them at all. We agree with the District Court in its findings that the defendant company here is not entitled to limit its liability. It has not sustained the burden which the statute casts upon it before it can claim the benefit of this limitation" (498).

In the instant case, Sweet, the Marine Superintendent, was the one to whom the petitioner entrusted the duty of inspecting the scow. His own testimony shows that he was guilty of gross negligence in his "inspection" of the scow. He went down in the scow's hold and just "looked around" with a flashlight to see if any of her timbers were broken. The scow was not drawing more than two feet of water at

the time (Sweet, 19), and it is obvious that no leak above this light water line would have been visible under such an examination. With respect to the tightness of her seams, he was content to look down one side of the scow by standing on her deck and peering over her rail.

In re Meyers Excursion & N. Co., 57 Fed. 240 (1893), affd. *The Republic* (CCA 2) 61 Fed. 109, a barge was hired to take a party on an excursion. In the course of the trip the barge encountered a severe wind storm, which lifted her hurricane deck and blew over the masts, killing several of the excursionists. The barge owner petitioned to limit its liability for the losses. The petition was dismissed. Judge BENEDICT said:

> "A proper examination of the vessel surely would have disclosed the unsound condition of the masts. * * * Such an examination would have disclosed the fact that the fastenings of the hurricane deck were insufficient. The petitioners *cannot, therefore, be held to be ignorant of what such an examination would have disclosed. They are chargeable with knowledge of what they might have known, and what they were bound to know, because of their obligation to provide a vessel fit for the employment to which it is put"* (242-3). (Italics ours.)

Petitioner has quoted from the opinion of the Circuit Court of Appeals in that case (which affirmed the decree of the District Court) at pages 16-17 of its brief, but has omitted to quote the very pith of the decision. Immediately following petitioner's quotation, Judge WALLACE said:

> "A loss is not occasioned without the privity or knowledge of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel, the vessel being under his immediate personal supervision" (61 Fed. 113).

Again, in *The Bessie, J.*, 268 Fed. 66 (1920), affd. (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620, the Court said:

> "There is no right to limit liability unless the vessel was seaworthy and reasonable care was exercised by the owner to see that she was properly manned, equipped and supplied" (67).

In *Braker* v. *Jarvis*, 166 Fed. 987 (1908), Judge ADAMS in the Southern District of New York, said:

> "It is well settled that the owner of a vessel is not entitled to limit his liability arising from the unseaworthiness of the vessel. If libelant (petitioner) was ignorant of the condition of the vessel, it was because of a negligent examination as in The Republic, 61 Fed. 109, 9 C.C.A. 386" (988).

The case of *Oregon* v. *Portland*, 162 Fed. 912 (1908) involved the question of the right to limit liability for the sinking of a barge due to unseaworthiness. The officers of the corporate owner testified that they had inspected the barge. The Court denied the petition to limit, saying:

> "No expert or other person was appointed or required by either the manager or superintendent of the lumber company (petitioner) to make a survey of the barge Monarch to determine with respect to her seaworthiness or fitness to undergo the service to which she was appointed under the demise; but these officers depended solely upon their own skill and ability for ascertainment of her condition" (921).

The cases discussed above are, we submit, directly in point with the instant case.

Sweet's examination was made when the scow was light, and drawing not more than two feet of water (Sweet, 19). Her sides were twelve feet high (Sweet, 17) and Sweet was looking for "leaks in her sides" or broken planks (Sweet,

22). It is quite obvious, we submit, that such an examination was altogether inadequate.

Petitioner says (Brief, p. 29):

> "In this case the evidence shows clearly and the Circuit Court of Appeals has held that the unseaworthiness * * * of the boat was without the privity or knowledge of her owner. It is said in the opinion as follows (p. 132):
>
> > "'In the case at bar the Cullen Company had no *actual* knowledge that she was in a leaky condition when sent out.'" (Italics ours.)

Petitioner's conclusion, we submit, is altogether unwarranted. No one has ever claimed that it had "actual knowledge" of the scow's unseaworthiness. But as we have shown in the above discussed cases, actual knowledge is not necessary. Petitioner having failed to use diligence to inform itself as to the unseaworthiness of the scow, is in privity or knowledge of the unseaworthy condition.

See also:

The Malcolm Baxter, supra, pages 35-36;
Craig v. *Continental,* 141 U. S. 638, 646, 12 Sup. Ct. 97;
In re Jeremiah Smith (CCA 2) 193 Fed. 395;
Eastern v. *Great Lakes* (CCA 1) 256 Fed. 497, 502;
Erie Lighter No. 108, 250 Fed. 490, 494;
In re Reichert Towing Line (CCA 2) 251 Fed. 214, 217, cert. den. 248 U. S. 565;
In re P. Sanford Ross (CCA 2) 204 Fed. 248, 250-251;
Chesapeake v. *Baltimore* (CCA 4) 40 Fed. (2) 394.

In *The Northern Belle,* 154 U. S. 571 (1870), Mr. Justice MILLER, delivering the opinion of this Court said:

> "It is the duty of the carrier who offers * * * barges for service to have them often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become, from age, or decay, or injury, unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer.
>
> "For this the best interest of all parties requires that he shall be held rigidly responsible" (572).

When Sweet "looked over" the scow, he made no tests of any kind whatsoever, and was apparently quite content to rely on what he could see with his naked eye when the scow was drawing only about two feet, although he knew that the scow was about to go under charter, for the purpose of carrying valuable cargo (Pierce, 111). Nothing at all was done to test the oakum in the scow's sides for tightness, and Sweet's "examination" in that respect consisted of standing on the scow's deck and looking down the side of the scow which was away from the pier to which she was moored (Sweet, 218).

Captain Gardner, petitioner's witness who examined the scow after the accident, testified that the only way to tell whether the oakum in a scow's seams was tight was to test it with an instrument "something like an ice pick but a little flatter" and to "shove it along the oakum, not into the oakum, to see if the oakum is tight in the seams" (Gardner, 99). Apparently petitioner was much more diligent in examining the boat after the accident than before it.

Yet Sweet, when he "looked over" the scow, merely flashed his light around, looking for broken deck beams or broken side planks, and peered down the scow's outboard side by looking down from her deck.

With reference to the proper method of examining a vessel for seaworthiness, and the necessity for tests, this

Court, in the case of *The Edwin I. Morrison,* 153 U. S. 199 (1894), said:

> "* * * that tapping with a hammer * * * might have developed any insecurity, if there were any; that no such tests were applied; but that the caps and plates appeared all right to visual observation * * * that examination by the eye is such as reasonably prudent master or owner might be expected to give such coverings in order to determine their seaworthiness, does not give it that effect. *The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure*" (215). (Italics ours.)

In *Warner Sugar Ref. Co.* v. *Munson,* 23 Fed. (2) 194 (1927), the Court, in speaking of the necessity of tests to determine seaworthiness, said:

> "The only testimony as to the condition of the pipe at that time was that of the first officer, who testified that before taking on cargo he looked through all the holds and saw there was no leaks in the pipes; that he made no other tests or examinations. * * *"
>
> "If a vessel owner is satisfied to *rely on external appearances* that the vessel and her appliances are in such good order that it is safe to take cargo on board, *instead of making fair examinations and tests,* the vessel owner assumes the responsibility for such defects as may exist and *which a diligent examination would reveal*" (197). (Italics ours.)

In *The Southwark,* 191 U. S. 1 (1903), this Court said:

> "The burden was upon the owner to show by making *proper and reasonable tests* that the vessel was seaworthy" (15). (Italics ours.)

In *The Leerdam* (CCA 5) 17 Fed. (2) 586 (1927), the Court said:

> "The evidence in this case is wholly unsatisfactory, and is consistent with the inference that *no test whatever was made or undertaken*" (587). (Italics ours.)

In *The Charlton Hall,* 285 Fed. 640 (1922), the Court said:

> "The inspection made of the pipes * * * appears to have been for the most part visual only; *no adequate tests being made* by tapping of the hammer or by other known methods.
>
> * * * * * * * *
>
> *"Mere visual inspection* * * * *was insufficient"* (641-2). (Italics ours.)

In *The Annie,* 261 Fed. 797 (1919) affd. (CCA 4), 269 Fed. 793, Judge WADDILL dismissed a petition for limitation of liability, and granted claimants a full recovery, upon the ground that the vessel owner had not caused any "proper or efficient test, hydrostatic or otherwise," to be made, *after the vessel had undergone repairs.*

In the case at bar, admittedly no tests were made, and it was not shown that repairs had ever been made. The "inspection" was made by peering over the scow's side and glancing at her seams.

While some of the authorities above discussed involve inspection under a defense of the Harter Act, rather than of the Limited Liability Act, we nevertheless submit that a proper inspection is a proper inspection, whether it be under the Limited Liability Act or in any other case. Since the Courts require a proper inspection in order for a vessel owner to limit liability for losses due to unseaworthiness, and also require a similar inspection in order to escape liability under the Harter Act, it is submitted that Harter Act cases as to what is proper inspection are very material to a similar inquiry under the Limited Liability Act.

Petitioner will no doubt contend that Sweet's negligence in not adequately inspecting *No. 32* is not sufficient to defeat petitioner's right to limitation, because Sweet was not a "managing officer" of petitioner. Thus, petitioner says (Brief, p. 45), "Even if it be held that Sweet's inspection was negligent, without the knowledge of the owner, * * * Cullen would still be entitled to limit liability. * * *." But, as we have argued above, Sweet was petitioner's Marine Superintendent and was in charge of the upkeep of its boats, and the privity of an agent primarily interested in the management of a vessel is the privity of the owner.

In the following cases limitation of liability was denied because of the negligence of the owner's servant other than a "managing officer":

In re P. Sanford Ross, Inc. (CCA 2) 204 Fed. 248—negligence of petitioner's superintendent;

Sanbern v. *Wright,* 171 Fed. 449, affd. (CCA 2) 179 Fed. 1021—failure of superintendent to make proper inspection of an unseaworthy boat;

In re Jeremiah Smith & Sons, Inc. (CCA 2) 193 Fed. 395—neglect of managing agent of line at one of its terminal ports;

Parsons v. *Empire* (CCA 9) 111 Fed. 202, cert. den. 183 U. S. 699—knowledge of a local agent at St. Michaels, Alaska;

Texas v. *Parker* (CCA 5) 263 Fed. 864, cert. den. 253 U. S. 488—negligence of manager;

The Bessie J, 268 Fed. 66, affd. (CCA 1) 276 Fed. 778, cert. den. 258 U. S. 620—knowledge of fleet manager of negligent custom of masters;

Erie Lighter No. 108, 250 Fed. 490—superintendent of the marine department of a railroad company.

Petitioner furthermore contends that having appointed a competent employee in Sweet to make the inspection, it should not be deprived of limitation because of his negligence. But there is absolutely no evidence showing that Sweet was competent to inspect the scow for seaworthiness. All that the testimony shows is that he had "been around" scows since 1918, and become Marine Superintendent for petitioner in 1924, which was the year immediately preceding this loss, and that prior to 1924 he was an "office man" (Sweet, 24).

Does that prove him capable of determining the condition of the scow as to her seaworthiness? We respectfully submit that it does not.

He was not shown to have been a qualified surveyor, to have taken part in building, caulking or repairing scows or to have any knowledge whatsoever in connection with scows. He had never seen the *No. 32* when she was loaded (Sweet, 30) and obviously knew nothing as to how the scow carried her load.

Assuming that petitioner would be entitled to limitation if it had selected a *competent* employee to inspect the scow, this would have no application to the instant case, where the authority of the person conducting the examination made him a managing agent of the corporation, and where there is absolutely no evidence to show his competency, and the burden of proof in this respect was upon petitioner. *Magill* v. *Michigan* (CCA 9) 144 Fed. 788, cert. den. 203 U. S. 593.

Not only has petitioner failed to bear its burden of proving its lack of privity or knowledge in the scow's unseaworthy condition, but its failure to offer any of its records in evi-

dence or to account satisfactorily for its failure to do so, and its failure to call any of its four or five employees who, it claims, kept its scows in good repair above the water line (Sweet, 28), give rise to a definite presumption that had the records been produced or the employees called as witnesses their evidence would have been unfavorable to petitioner's case.

Clifton v. *United States,* 4 How. 242, 246;
The Eastchester (CCA 2) 20 Fed. (2) 357, 358;
The New York, 175 U. S. 187, 204; 20 S. Ct. 67, 44 L. Ed. 126;
The Richmond, 275 Fed. 970;
The Georgetown, 135 Fed. 854;
The Bombay, 46 Fed. 665;
Consolidated v. *Knickerbocker,* 200 Fed. 840.

The unseaworthiness of the *Cullen No. 32* having been within the privity and knowledge of petitioner because of the negligence of its Marine Superintendent, it is respectfully submitted that petitioner was not entitled to limitation and that the petition was properly dismissed by the District Court and by the Circuit Court of Appeals.

Resumé.

It is respectfully submitted that the Decrees of the Circuit Court of Appeals and of the District Court should be affirmed for the following reasons:

First, the warranty of seaworthiness which the law affirmatively implies in every such contract was admittedly breached by petitioner; there is no valid ground for a distinction between an express warranty and an implied warranty in such cases, and this Court established the rule that the breach of an implied warranty of seaworthiness will de-

feat limitation in *Capitol Transportation Co.* v. *Cambria Steel Co., supra,* pages 21-23;

Second, respondent was demise charterer of the scow and bailee of her cargo at the time of the loss, and its right to maintain a suit to recover the cargo loss as bailee thereof, for breach of the warranty of seaworthiness, was declared by this Court in *Pendleton* v. *Benner Line, supra,* pages 32-33;

Third, Even if this Court be of opinion that breach of an implied warranty of seaworthiness will not of itself defeat the right to limitation of liability, nevertheless petitioner failed to show that the unseaworthy condition of the scow was without its privity or knowledge because (1) it failed to make a full and frank disclosure of the prior history of the scow, (2) it failed to prove the scow's age or when she had last been drydocked or in any manner repaired, and such failure not only defeats its claim of lack of privity or knowledge in the unseaworthy condition of the scow, but creates a definite presumption that any attempt to make such proof would have been harmful to petitioner's case, (3) its Marine Superintendent made a most cursory and casual "examination" of the scow, looking with a flashlight at her "upper beams" and to see "if she had any planks broken," (4) its Marine Superintendent was not shown to have been a competent person or to have had any adequate knowledge of the proper manner of inspecting a scow for seaworthiness, and (5) although petitioner's own witness Gardner explained the proper manner of testing seams for tightness of oakum, the Superintendent made no tests and was content "to rely on external appearances * * * instead of making fair examinations and tests" (*Warner Sugar Ref. Co.* v. *Munson, supra*).

IV.

The decrees should be affirmed, with costs.

Respectfully submitted,

FORREST E. SINGLE,
Counsel for Respondent.

THOMAS H. MIDDLETON,
on the Brief.

SUPREME COURT OF THE UNITED STATES.

No. 9. October Term, 1933.

Cullen Fuel Company, Inc., Petitioner, vs. W. E. Hedger, Inc. | On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 6, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner owned a deck scow known as Cullen No. 32. The respondent wished to use her to lighter ore from ship-side in New York harbor to the plant of the Grasselli Chemical Co., the consignee of the ore. A charter for an indefinite term, at a fixed daily rate of hire, was orally arranged by telephone with the petitioner's marine superintendent. The day following the demise, while being loaded from the ship, the scow capsized, dumped her cargo, and damaged an adjacent wharf and vessel. Suits ensued, one of them by the respondent as bailee of the cargo, against the petitioner as owner of the scow. Limitation of liability was sought by the petitioner, but the district court refused a decree for limitation,[1] finding that the scow was unseaworthy at the time of the demise.

The circuit court of appeals concurred in this finding and based its affirmance[2] of the trial court's decision upon the ground that as the charter was the personal contract of the owner and included an implied warranty of seaworthiness the petitioner was precluded from the benefit of the limitation statutes.[3]

The petitioner, conceding that where the owner personally expressly warrants seaworthiness he is not entitled to the benefit of the limited liability statutes, (*Pendleton* v. *Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139), correctly states that despite the decision of this court in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334, the con-

[1] 45 F. (2d) 859.

[2] 62 F. (2d) 68.

[3] R. S. 4283, 4289; Act of June 26, 1884, c. 121, § 18, 23 Stat. 57; U. S. Code, Tit. 46; §§ 183, 188, 189.

trariety of opinion which existed in the various circuits prior to that case, as to the effect of the implied warranty of the owner,[4] still persists.[5] We therefore granted certiorari.[6].

We pass, without discussion, the contentions that the court below erred in its rulings that the owner's contract was personal and that the respondent as bailee of the cargo was entitled to recover from the charterer, as we are of opinion that both points were correctly decided (*The Benjamin Noble*, 232 Fed. 382; 244 Fed. [illegible]; *Capitol Transportation Co. v. Cambria Steel Co., supra; Pendleton* v. *Benner Line, supra*, 355-356), and come to the question of petitioner's right of limitation notwithstanding the implied warranty of seaworthiness. The *Capitol Transportation* case is an authority against the right. As appears by the opinion of the district court (232 Fed. 382) the contract of the owner in that case was oral and no express warranty was given.

We see no reason to restrict or modify the rule there announced. The warranty of seaworthiness is implied from the circumstances of the parties and the subject-matter of the contract and may be negatived only by express covenant.[7] It is as much a part of the contract as any express stipulation. *Hudson Canal Co.* v. *Penna. Coal Co.*, 8 Wall. 276, 288; *Grossman* v. *Schenker*, 206 N. Y. 466, 469; *United States* v. *Bentley*, 293 Fed. 229.

The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control. Compare *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253; *The Ice King*, 261 Fed. 897; *The Soerstad*, 257 Fed. 130.

The judgment is affirmed.

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[4] *Quinlan* v. *Pew*, 56 Fed. 111; *The Republic*, 61 Fed. 109; *The Tommy*, 151 Fed. 570; *Great Lakes Towing & Trans. Co.* v. *Mill Transp. Co.*, 155 Fed. 11; *The Loyal*, 204 Fed. 930.

[5] *The Ice King*, 261 Fed. 897; *Pocomoke Guano Co.* v. *Eastern Trans. Co.*, 285 Fed. 7; *The City of Camden*, 292 Fed. 93; *Tucker Stevedoring Co.* v. *Southwark Mfg. Co.*, 24 F. (2d) 410.

[6] 289 U. S. 717.

[7] *Lawrence* v. *Minturn*, 17 How. 100, 110; *Work* v. *Leathers*, 97 U. S. 379; *The Caledonia*, 157 U. S. 124, 130; *The Carib Prince*, 170 U. S. 655; *The Irrawaddy*, 171 U. S. 187, 190; *The Southwark*, 191 U. S. 1.